Supreme Court, U.S.
FILED
MAR 26 2002
OFFICE OF THE CLERK

No. 01-1446

IN THE

# Supreme Court of the United States

PAUL FORMAN,

*Petitioner*,

v.

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION,

*Respondent*.

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITION FOR A WRIT OF CERTIORARI

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

*Attorneys for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

10497

## QUESTION PRESENTED

Whether a discrimination case involving noncompetitive promotion should be subject to more restrictive standards of proof than one involving competitive promotion.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| STATUTE INVOLVED | 2 |
| STATEMENT | 2 |
| Background | 3 |
| The Decision of the Court of Appeals | 6 |
| REASONS FOR GRANTING THE PETITION | 9 |
| Introduction | 9 |
| 1. The Conflict with this Court's Decisions | 13 |
| 2. The Conflict with Other Circuits | 18 |
| 3. The Impropriety of Summary Judgment | 19 |
| CONCLUSION | 20 |
| APPENDIX A | 1a |
| APPENDIX B | 28a |
| APPENDIX C | 30a |
| APPENDIX D | 31a |
| APPENDIX E | 61a |

# TABLE OF AUTHORITIES

CASES — Page

*Aka v. Washington Hospital Center*, 156 F.3d 1284, 1299 (D.C. Cir. 1998) (*en banc*) ..... 19
*Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982) ..... 6
*Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996) ..... 19
*Equal Employment Opportunity Commission v. Franklin and Marshall College*, 775 F.2d 110 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986) ..... 18
*Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) ..... 7, 17
*Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000) ..... 7
*Hunt v. Cromartie*, 526 U.S. 541 (1999) ..... 3
*Lehman v. Nakshian*, 453 U.S. 156 (1981) ..... 10
*Lynn v. Regents of the University of California*, 656 F.2d 1337 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) ..... 18
*McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976) ..... 12, 16
*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ..... 11, 15, 16
*Morton v. Mancari*, 417 U.S. 535 (1974) ..... 10
*Namenwirth v. Board of Regents of the University of Wisconsin System*, 769 F.2d 1239 (7th Cir. 1985) ..... 18
*Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ..... 11, 13
*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) ..... 7
*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) ..... 8, 11, 14, 20

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980) | 18 |
| *Sweeney v. Board of Trustees of Keene State College*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980) | 18 |
| *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) | 11, 13, 15 |
| *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) | 10 |
| *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990) | 12, 16 |
| STATUTES | |
| 29 U.S.C. § 633a | 10 |
| 42 U.S.C. § 2000e-16 | 10 |

IN THE

# Supreme Court of the United States

---

No. ___

---

PAUL FORMAN,

*Petitioner*,

v.

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION,

*Respondent*.

---

**Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

## PETITION FOR A WRIT OF CERTIORARI

---

Paul Forman petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

## OPINIONS BELOW

The opinion of the Court of Appeals, which is reported at 271 F.3d 285 (D.C. Cir. 2001), appears at App. A, 1a- 27a. The Court's orders denying rehearing and rehearing *en banc* appear at App. B, 28a-29a. The district court did not write an opinion; the court's order granting summary judgment appears at App. C, 30a. The transcript of the argument on summary judgment in the district court appears at App. D, 31a-60a. Excerpts from the parties' Joint Appendix in the Court of Appeals appear at App. E, 61a-78a.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 2001. Rehearing and rehearing *en banc* were denied on December 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

This case involves the application of the Age Discrimination in Employment Act to Federal employment, 29 U.S.C. § 633a. Subsection (a) of the statute provides:

> § 633a. Nondiscrimination on account of age in Federal Government employment
>
> (a) Federal agencies affected
>
> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

## STATEMENT

Petitioner Paul Forman, a 65-year old curator at the Smithsonian Institution, filed a *pro se* action in 1996 alleging that (1) the Smithsonian's refusal to promote him to GS-14 in

1991 constituted discrimination based on age, and (2) its refusal in 1995 again to promote him to GS-14 constituted both age discrimination and retaliation for having challenged the 1991 promotion denial. The district court granted summary judgment for the agency in a bench ruling; no opinion was issued. App. C, 30a.[1] The Court of Appeals affirmed as to both the 1991 and 1995 discrimination claims and reversed on the 1995 retaliation claim. App. A, 1a. This petition focuses solely on the Court's treatment of the 1991 discrimination claim, which is addressed at Section II.A of its opinion. App. A, 10a-13a.

The Court of Appeals determined that Forman established a prima facie case that the Smithsonian's refusal to promote him in 1991 was due to age discrimination. Because the promotion was noncompetitive, however, the Court did not allow Forman to rely on circumstantial evidence and held that the *only* means open to him to prove pretext was to show that the explanation advanced by the agency for the promotion denial—that he had not recently written a book—was contrary to fact. But while it was undisputed that Forman had not finished the book on which he had been working, it was hotly contested whether that fact was the true motivation for the promotion denial. *See Hunt v. Cromartie*, 526 U.S. 541 (1999). The holding of the Court of Appeals, which bars employees subject to noncompetitive personnel actions from relying on circumstantial evidence and thereby gives those employees a reduced level of protection against discrimination, conflicts both with the decisions of this Court and with those of other courts of appeals.

*Background.* The promotion process for curators at the Smithsonian is noncompetitive. Every three years, the agency's Professional Accomplishments Evaluation Committee (PAEC), a peer review group, assesses each curator at

---

[1] The district court had jurisdiction under 29 U.S.C. § 633a(c).

GS-13 and below and makes a recommendation on promotion. Upper management, including the Museum Director and Assistant Secretaries, may then weigh in, and prior to 1995 the Secretary made the final decision. It is undisputed that, in practice, the PAEC's recommendation is honored 90 percent of the time.

Paul Forman received a Ph.D. in History of Science from the University of California at Berkeley in 1967, and he has served as curator of the Smithsonian's modern physics collection since 1972. In 1988, when Forman was at the GS-13 grade level, the PAEC recommended his promotion to GS-14, but management declined. He then went on two-year detail to New York, during which his principal task was to prepare a draft of a book on Charles Townes, a scientist whose work was instrumental in the development of atomic clocks. Following a lull in writing on that project for which he was criticized in an interim appraisal in May 1990, Forman began to produce "'commendable chapters of the Townes . . . manuscript at a steady pace.'" App. A, 3a; *see* App. E, 61a. As a result, his final performance rating as of August 31, 1990, upon his return from New York, was "fully successful," just as it had been for the first year of the detail. App. A, 2a-3a.[2]

Forman's August 1990 evaluation noted that his recent chapters on Townes were "submitted on schedule, thorough, and well-developed and written." App. E, 63a (Column III). Those new chapters, "[t]ogether with earlier FY 90 material on Townes" that Forman had produced, "constitute[d] successful performance" on his "[p]rimary project" for the year, "[p]reparation of a book" on atomic clocks. *Id.* At that point, however, Townes began "refusing access to his

---

[2] Forman's supervisor during the detail was Douglas Evelyn, the Deputy Director of the National Museum of American History, where Forman works.

papers," App. A, 12a, so Forman could not complete the book. Still, he again got a "fully successful" rating in 1991. *Id.*, 3a. In sum, Forman's primary job element during his New York detail (or "sabbatical") was preparation of a book, and his annual ratings reflect that his supervisors judged that he had addressed this task in a satisfactory fashion.

Also in 1991, the PAEC once again recommended Forman's promotion to GS-14. In connection with that recommendation, Assistant Secretary Robert Hoffmann surveyed experts in Forman's field for comments on his work. The responses were glowing, saying that Forman is "one of the very best historians of modern physics on either side of the Atlantic," App. E, 68a; "the best historian of science at the Smithsonian, and one of the two or three best historians in any field, in any of the museums," *id.*, 70a; "the Smithsonian's luminary in the history of science," *id.*, 75a; "at the very top of his profession, internationally . . . as well as domestically," *id.*, 76a; "a rigorous, implacable, thoughtful scholar, who tackles tough questions, researches exhaustively, and writes with precision and care," *id.*, 66a. In light of these views, Hoffmann endorsed Forman's promotion:

> a number of highly-respected scholars hold a very high opinion of Paul Forman's work, and not based simply on the strength of the reputation that he had established earlier. * * * I believe that someone who is clearly considered by the best of his peers as one of the best historians of modern science, both in his scholarly writings and in the exhibitions he has curated, is deserving of a grade 14.

App. E, 77a-78a.

Another Assistant Secretary, however, recommended against promoting Forman. And in the end, Secretary Robert Adams denied the promotion, "expressing concern that notwithstanding Dr. Forman's international reputation as an historian, he had failed to produce a book-length manuscript

on atomic clocks 'or any other work of comparable scope'" as a product of his two-year detail. App. A, 4a.

Completion of a book is not generally a condition of promotion for curators. Nor was it a pre-announced condition for Forman. Rather, it was mentioned for the first time after the PAEC recommended his promotion in 1991.

The 1991 promotion denial was unusual in another respect as well. As noted above, the PAEC had recommended Forman's promotion to GS-14 in 1988 and again in 1991. Smithsonian management customarily follows the recommendations of the PAEC, and never before had a curator been refused promotion after twice being recommended by the PAEC: "he alone of all curators had been twice denied promotions in the face of two recommendations by the peer committee." App. A, 10a.

*The Decision of the Court of Appeals.* The Court of Appeals noted that "[t]he Smithsonian does not dispute that Dr. Forman is highly praised by outside scholars for both his exhibits and scholarly writing and that he was generally qualified for promotion." App. A, 9a. The Court then held that Forman had established a prima facie showing of age discrimination as to the 1991 promotion denial under *Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C. Cir. 1982), because he was over 40, qualified, rejected for promotion and was "disadvantaged in favor of a younger person." App. A, 10a.

On this latter point, the Court held that Forman had adduced two different types of proof that age was a factor in the promotion denial. First,

> Dr. Forman presented expert statistical evidence to show that younger employees were favored for promotion. Specifically, Dr. Forman presented evidence that persons under forty-five years of age had a higher rate of promotion to Grade 14 than those over forty-five, and that there was an inverse correlation between a curator's

> age and the annual ratings given for research. These differences were statistically significant. . . .

App. A, 10a.

> Second,
>
> Dr. Forman presented evidence that when Secretary Adams was reviewing Dr. Forman's 1991 promotion papers with the two Assistant Secretaries, a series of comments were made that implicitly referred to Dr. Forman's age. According to Assistant Secretary Hoffman, comments were made that Dr. Forman may be "over the hill" or in the "twilight of his career," and may have "written his last significant article." As pointed out in *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir. 2000), when decision makers, or those who have input into the decision, express such discriminatory feelings around the relevant time in regard to the adverse employment action complained of, "then it may be possible to infer that the decision makers were influenced by those feelings in making their decisions." *Id.* at 653. Moreover, the employer's correlation of old age with declining productivity represents the very essence of age discrimination. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

App. A, 11a (parallel citations omitted).

Having determined that Forman had established a prima facie case of age bias, the Court held that the agency had articulated a nondiscriminatory explanation for the 1991 promotion denial: that Forman had not completed a book-length manuscript. App. A, 11a. The Court then turned to "the dispositive question"—"whether [Forman] showed that the Smithsonian's explanation for its decision not to promote him in 1991 was a pretext for discrimination." *Id.* More precisely, since this case arose on summary judgment, the

"dispositive" issue was whether Forman had presented evidence from which the trier of fact could find pretext, after "draw[ing] all reasonable inferences in [Forman's] favor" and "disregard[ing] all evidence favorable to the [Smithsonian] that the [trier of fact] is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).

Yet in assessing the question of pretext, the Court of Appeals treated the Smithsonian's explanation—Forman's failure to complete a book—as unassailable by any means other than direct demonstration of its falsity. That is, the Court held that because a noncompetitive promotion was at issue, the trier of fact was compelled to credit the agency's rationale unless it was factually inaccurate; this meant that Forman could not rely on circumstantial evidence of pretext and could prevail *only* by showing that he had written a book during the period in question:

> It is undisputed that Dr. Forman's performance plans for the relevant period called for him to produce a book or comparable body of work. Dr. Forman did not produce evidence to show fulfillment of this requirement.
>
> * * *
>
> Dr. Forman's task is more difficult to the extent he is competing against himself. * * * Unless he could show that he had fulfilled the central purpose of his sabbatical and performance plans, he cannot show that Secretary Adams' reason for denying his promotion was pretextual.

App. A, 12a-13a.

Given the Court's approach, a number of earlier acknowledged facts were now irrelevant, *e.g.*, that Forman's performance for the entire period in question (1989-1991) had been rated as "fully satisfactory" because he had met all

production goals during this time frame, App. A, 2a-3a, and that he could not complete the book on Charles Townes because Townes was "refusing access to his papers," *id.*, 12a:

> the fact that Dr. Forman may have met word targets is not the equivalent of producing a final book-length manuscript. . . . Nor does Dr. Forman's inability to finish his Townes manuscript because of factors beyond his control rebut the fact that he did not produce a critical element of his performance plan for several years.

App. A, 12a.

The Court of Appeals also divorced from its analysis of pretext the evidence on which Forman relied to establish a prima facie case, *e.g.*, the age-laden comments: "notwithstanding the age-based comments at the discussion of [Forman's] promotion, the Smithsonian produced evidence of a nondiscriminatory reason for denying him a noncompetitive promotion in 1991." App. A, 12a.

Finally, the Court held that the noncompetitive nature of the promotion in dispute did not permit Forman to utilize comparative evidence in proving pretext:

> Dr. Forman's task is more difficult to the extent he is competing against himself. That the promotion of others did not depend on completion of a book is irrelevant to Dr. Forman's particular promotion decision.

App. A, 13a.

## REASONS FOR GRANTING THE PETITION

*Introduction.* Before this case, neither this Court nor any Federal court of appeals had suggested that a lower level of protection from discrimination attaches to employees subject to noncompetitive personnel actions. Yet that is the certain result of the D.C. Circuit's decision, which (1) bars an employee who is only "competing against himself" from

relying on comparative evidence showing that less stringent standards were applied to others, App. A, 13a, (2) precludes use of the evidence establishing the prima facie case of bias to inform the analysis of pretext, *id.*, 12a, and (3) compels the trier of fact to credit the employer's nondiscriminatory explanation as the true reason for the challenged action (as long as the explanation itself is not contrary to fact), *id.*, 12a-13a. These rulings conflict with the decisions of other courts of appeals; more importantly, they run afoul of this Court's precedent. *See* S.Ct.R. 10(a), (c).[3]

This Court has recognized that "the question facing triers of fact in discrimination cases is both sensitive and difficult" and that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983). For this reason, direct evidence of discriminatory intent is not required. *Id.* at 717.

Given the central role of circumstantial evidence in discrimination cases, the Court has approved many ways of proving pretext and has ruled that a plaintiff "is not limited to presenting evidence of a certain type" in this endeavor,

---

[3] This case arises under 29 U.S.C. § 633a, the provision of the Age Discrimination in Employment Act (ADEA) specifically applicable to Federal employment, but the substantive protections against age bias are generally the same in both the private and public sectors. This Court has noted that the legislation that became § 633a was "patterned directly after" Section 717 of Title VII, 42 U.S.C. § 2000e-16, "which extend[ed] Title VII protections to federal employees." *Lehman v. Nakshian*, 453 U.S. 156, 167 n.15 (1981). And "[i]n general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government." *Morton v. Mancari*, 417 U.S. 535, 547 (1974). The same is true with § 633a; *i.e.*, the "substantive anti-discrimination law embraced in [the ADEA] was carried over and applied to" Federal employment. *See* App. A, 18a ("[n]othing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace").

because "[t]he evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms." *Patterson v. McLean Credit Union*, 491 U.S. 164, 187 (1989). Thus the Court has held that a plaintiff's evidence in an EEO suit can serve double duty—to make out a prima facie case and, when that task is finished, to show pretext:

> although the presumption of discrimination "drops out of the picture" once the defendant meets its burden of production * * * the trier of fact may still consider the evidence establishing the plaintiff's prima facie case "and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual."

*Reeves v. Sanderson Plumbing Products*, 530 U.S. at 143, *quoting Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981). Here, however, the D.C. Circuit's assessment of pretext expressly excluded strong evidence of age bias that it had earlier cited in holding that Forman had established a prima facie case. This included "expert statistical evidence" and "age-laden comments." *See* App. A, 8a, 10a-11a.

Among the several forms of circumstantial evidence that may be pertinent to proof of pretext, this Court has repeatedly emphasized the relevance of comparative evidence, *i.e.*, evidence comparing the treatment of the plaintiff with that given younger employees (or whites or men, depending on the type of bias alleged). *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (calling evidence comparing the treatment of black and white employees "[e]specially relevant" to the assessment of pretext in a case of possible racial discrimination). The Court has never held, or even suggested, that comparative evidence is probative only in cases involving competitive personnel actions. But here the Court of Appeals relied on the noncompetitive nature of the

promotion at issue to dismiss any comparison of the conditions of promotion imposed on Forman with the more lenient standards for younger curators. In particular, the Court said that it was "irrelevant" that a book was not a condition of promotion for others, because Forman was "competing against himself." App. A, 13a.

The Court of Appeals was led into error by treating the noncompetitive nature of the promotion at issue as pivotal—and as precluding Forman from establishing pretext by any means other than proving the falsity of the agency's explanation. But many personnel actions are noncompetitive in the sense that the employer is not choosing from among several employees but is instead making a decision based on an individual worker's merits (or demerits). Such actions include not only the type of promotion that Forman sought but also may encompass the award of salary increases or bonuses, as well as the imposition of discipline.

This Court has consistently held that a wide variety of proof, including comparative evidence, is directly relevant to the issue of discrimination in such noncompetitive settings. *See University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 193 (1990) (peer review materials relating to professors granted tenure were relevant in a suit alleging discriminatory tenure denial); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 283 (1976) (disciplinary standard must be applied similarly to members of all races, and "Title VII is violated if . . . it was not").

Because the Court of Appeals impermissibly constrained Forman's proof of pretext, it simply did not consider the strong evidence that he had marshaled on this issue, including both the proof supporting his prima facie case and that relating to the more lenient standards applied to others. Had all this evidence been considered, the Court would not have affirmed summary judgment as to the 1991 promotion claim,

because a trier of fact could reasonably have concluded that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253.

1. *The Conflict with this Court's Decisions.* The Court of Appeals affirmed the district court's grant of summary judgment for the agency on Forman's claim that the 1991 promotion denial was the product of age discrimination, holding that the *only* way he could prove pretext was by showing that he had in fact finished a book during the period in question.[4] That is, "[u]nless [Forman] could show that he had fulfilled the central purpose of his sabbatical and performance plans, he cannot show that Secretary Adams' reason for denying his promotion was pretextual." App. A, 13a. As this Court has held, however, such an approach to proof of pretext is impermissibly narrow.

a. In *Patterson v. McLean Credit Union*, *supra*, the Fourth Circuit had held that the plaintiff could establish pretext only by proving that she was better qualified than the person chosen. This Court saw such a limitation on proof as overly restrictive:

> Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons. * * * *In doing so, petitioner is not limited to presenting evidence of a certain type.* * * * The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. * * * Indeed, she might seek to demonstrate that respondent's claim to have

[4] There is no dispute that Forman had earlier completed several book-length manuscripts. His *c.v.* lists ten titles under "Books," five published before 1991.

> promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was required to make such a showing. *There are certainly other ways in which petitioner could seek to prove that respondent's reasons were pretextual.*

491 U.S. at 187-88 (emphasis supplied).

In the present case, the "other ways in which [Forman] could seek to prove that [the agency's] reasons were pretextual" included the evidence that he had presented in support of his prima facie case, *i.e.*, "expert statistical evidence . . . show[ing] that younger employees were favored for promotion" and that there was "an inverse correlation between a curator's age and the annual ratings given for research," App. A, 10a, as well as "age-laden comments" at the time of the decision reflecting that "age was a *primary consideration* in the denial of [Forman's] promotion in 1991," *id.*, 11a (emphasis supplied). In *Reeves*, this Court held that "the trier of fact may. . . consider the evidence establishing the plaintiff's prima facie case . . . 'on the issue of whether the defendant's explanation is pretextual.'" 530 U.S. at 143. But the Court of Appeals did not consider the prima facie evidence when assessing pretext, because it held that Forman could establish pretext *only* by showing that he had recently finished a book. App. A, 13a.

The Court likewise refused to consider other evidence reflecting the pretextual nature of the reason given for the promotion denial. In particular, the Court brushed aside (1) Forman's undisputed proffer that he could not finish the book on Townes because Townes (having decided to write an autobiography) was refusing access to his papers, and (2) proof that Forman had in fact met the word targets set forth in his performance plans. Of course, these factors explained why the annual ratings for Forman's work were positive for

the entire period in question, including the detail (or sabbatical) in New York. But the Court of Appeals paid no heed to the annual ratings, either. Nor had the district court. *See* App. A, 13a.

Forman acknowledges that the Smithsonian has "articulate[d] [a] legitimate, nondiscriminatory reason" for the 1991 promotion denial. *McDonnell Douglas*, 411 U.S. at 802. But this does not end the inquiry, because Forman is entitled to "a full and fair opportunity to demonstrate pretext." *Burdine*, 450 U.S. at 256. He did not get that here.

b. Noncompetitive promotion is a staple in the Federal government, and it is also present in academia. In Federal employment, certain promotions are posted for competition, while those involving "career ladders" are handled noncompetitively.[5] In American colleges and universities, tenure decisions and other promotion actions are usually made in a noncompetitive setting. That is, instructional staff do not compete for a single professorial slot but instead are considered for advancement based on their own individual merit, with peer review generally a central part of the process. The Smithsonian's procedure for promoting curators combines the Federal career ladder approach with the peer review element characteristic of academia.

This Court has repeatedly emphasized that comparative evidence lies at the heart of discrimination analysis, whether or not the personnel action in question is competitive. *See McDonnell Douglas*, 411 U.S. at 803 ("[e]specially relevant to such a showing [of pretext] would be evidence that white

---

[5] A career ladder (sometimes called career path) entails progressively greater levels of responsibility and pay within the same job category. For example, the typical career ladder for attorneys at the Department of Justice begins at GS-12 for recent law school graduates and tops out at GS-14. Promotion to the next higher grade within the ladder is noncompetitive; it depends on supervisory confirmation of successful performance and usually requires a waiting period of one year.

employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired"); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. at 283 ("[w]hile Santa Fe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races'").

There is no indication that the disciplinary actions in *McDonnell Douglas* and *Santa Fe* were in any sense competitive; that is, the employer did not choose among candidates to punish for a single offense. Rather, an employee of one race was disciplined for a particular misdeed, and this Court said that it would be probative to determine whether employees of a different race were punished for similar misconduct.

A similar conception of relevant evidence animated *University of Pennsylvania v. EEOC*, *supra*, in which the University contested a subpoena issued by EEOC in an investigation of an allegation of bias in denial of tenure. A tenure decision is the prototypical noncompetitive promotion; the candidate is given an up or down decision based on her own record. Still, the EEOC wanted the peer review materials associated not only with the complaining party's candidacy but also with the candidacies of others who were granted tenure. This Court agreed that such material was relevant, rejected arguments grounded on privilege and academic freedom, and enforced the subpoena:

> Often . . . disclosure of peer review materials will be necessary in order for the Commission to determine whether illegal discrimination has taken place. * * * The Court of Appeals for the Third Circuit expressed it this way:
>
> * * * "There may be evidence of discriminatory intent and of pretext in the confidential notes and memorand[a] which the [college] seeks to protect. Likewise,

> *confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure* or that some pattern of discrimination appears." * * *

493 U.S. at 193 (emphasis supplied).

If a black curator at the Smithsonian were denied promotion because he had not written a book, it would be relevant to inquire if book writing was required of whites seeking promotion. Yet here the Court of Appeals ruled that "the promotion of others" who had not completed a book was "irrelevant to Dr. Forman's particular promotion decision." App. A, 13a. This was so even though statistical evidence showed that younger curators were favored for promotion. Moreover, the discussion of Forman's promotion featured "age-laden comments" to the effect that he might be "over the hill" or in the "twilight of his career," and that he may have "written his last significant article." *Id.*, 11a. The Court of Appeals saw these remarks as suggesting a "correlation of old age with declining productivity [that] represents the very essence of age discrimination." *Id.*, *citing Hazen Paper Co. v. Biggins*, *supra*. Indeed, the comments can easily be seen as explaining why Forman, an older curator, was required to meet a condition of promotion that was not demanded of his younger colleagues; *i.e.*, the book-writing criterion was applied to Forman precisely because of misbegotten stereotypes equating advancing age with productivity decline.

In any event, the use of comparative evidence to prove pretext is available regardless of whether the personnel action in dispute is competitive. The Court of Appeals was simply wrong in holding that, because Forman was "competing against himself," the fact "[t]hat the promotion of others did not depend on completion of a book is *irrelevant*" to his claim. App. A, 13a (emphasis supplied).

2. The *Conflict with Other Circuits*. The primary reason to grant this petition is set forth in Supreme Court Rule 10(c), because here "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." But it is also true that, in ruling as it did, the D.C. Circuit "entered a decision in conflict with the decision of another United States court of appeals on the same important matter." S.Ct.R. 10(a).

Other courts of appeals have long held, for example, that comparative evidence is probative in cases alleging discrimination in tenure and other academic promotions—decisions that are typically noncompetitive. *See Sweeney v. Bd. of Trustees of Keene State College*, 604 F.2d 106, 112 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980) (citing "testimony that Sweeney was at least as qualified as others who had been promoted to full professorship"); *Equal Employment Opportunity Commission v. Franklin and Marshall College*, 775 F.2d 110, 116 (3d Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986) ("confidential material pertaining to other candidates for tenure in a similar time frame may demonstrate that persons with lesser qualifications were granted tenure or that some pattern of discrimination appears"); *Smith v. University of North Carolina*, 632 F.2d 316, 340 (4th Cir. 1980) (plaintiff must show, "in the case of promotion, the employer had promoted other persons possessing similar qualifications at approximately the same time"); *Namenwirth v. Board of Regents of the University of Wisconsin System*, 769 F.2d 1239, 1240-41 (7th Cir. 1985) ("[t]he state of Wisconsin has argued . . . that comparisons are out of place in a tenure decision. We disagree. * * * [The magistrate judge] recognized and considered . . . the comparative evidence concerning the qualification of males tenured at about the time Namenwirth was denied tenure"); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1340 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982)

(female plaintiff must show "that in cases of reappointment (or tenure) others (*i.e.*, males) with similar qualifications achieved the rank or position").

Other circuits also recognize that the failure of a plaintiff to satisfy the employer's articulated criterion is not dispositive on the question of pretext. In this regard, the Seventh Circuit has said that proof of "[p]retext does not require that the facts presented by the defendant as the reason for its employment action not be true, only that they not be the reason." *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 634 (7th Cir. 1996). In the present case, however, the Court of Appeals held that Forman could prove pretext *only* by showing that the Smithsonian's explanation for the 1991 promotion denial—*i.e.*, that he had not recently completed a book—was not factually accurate. *See* App. A, 13a.

It is instructive that the Court of Appeals itself, in an earlier decision involving a competitive selection, followed the same path as the Seventh Circuit in *Emmel*:

> an employment discrimination plaintiff is not limited to arguing that the employer's explanation is wrong on the merits, but he can also attempt to show by other means that the explanation was made up to disguise illegitimate bias.

*Aka v. Washington Hospital Center*, 156 F.3d 1284, 1299 (D.C. Cir. 1998) (*en banc*).

But the Court of Appeals held that *Aka*'s reasoning did not apply here, and this was precisely because Forman's promotion was noncompetitive—he was "competing against himself." App. A, 13a. This holding conflicts with the decisions of other courts of appeals, as well as with this Court's precedent.

3. *The Impropriety of Summary Judgment.* This is not a case in which an appellate court arguably weighed the

evidence incorrectly and, for that reason, improperly affirmed a grant of summary judgment. Rather, the Court of Appeals applied the wrong legal standard and denied *any* relevance to much of the evidence that Paul Forman presented on pretext. Hence this evidence—including the statistics, the "age-laden comments" and the agency's failure to require completion of a book as a condition of promotion for younger curators—was not weighed at all.

If this petition is granted, the Court could remand this case to the Court of Appeals to consider whether summary disposition was appropriate on the 1991 promotion denial when the proper legal standard is applied and consideration is given to all of Forman's evidence on pretext. In light of *Reeves*, 530 U.S. at 150-51, though, it is evident that summary judgment should not have been granted in those circumstances, and the Court may want to consider saying that now.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

*Attorneys for Petitioner*

# APPENDICES

**APPENDIX A**

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

---

No. 00-5256

---

PAUL FORMAN,
*Plaintiff-Appellant,*

v.

LAWRENCE M. SMALL,
Secretary, Smithsonian Institution,
*Defendant-Appellee.*

---

Appeal from the United States District Court
for the District of Columbia
Thomas Penfield Jackson, District Judge
(CA 96-2735)

---

Argued Sept. 7, 2001.
Decided Nov. 16, 2001.

---

Before: HENDERSON, RANDOLPH and ROGERS, *Circuit Judges.*

ROGERS, *Circuit Judge*:

Paul Forman appeals the grant of summary judgment to the Smithsonian Institution on his claims of age discrimination and retaliation under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 633a (1994 & Supp. V 1999). He contends that he established a prima facie case on each of his claims and rebutted the Smithsonian's stated explanations for its actions. We affirm the judgment on his claims of

discrimination with regard to his 1991 and 1995 promotions, but we reverse as to his claim of retaliation with regard to his 1995 promotion.

I.

Paul Forman is a curator for Modern Physics at the National Museum of American History of the Smithsonian Institution. He was hired in 1972 as an associate curator, Grade 12, and received a promotion in 1975 to curator, Grade 13. He was passed over for a non-competitive promotion to Grade 14 in 1988 and 1991-92. In 1995, a decision concerning his promotion was postponed for one year. He was promoted to Grade 14 in 1996 when he was 59 years old. The relevant background to these decisions is as follows.

In May 1988, Dr. Forman requested and was granted a two-year temporary duty assignment to New York City with the primary task of preparing a draft of a book on the history of atomic clocks.[1] His normal day-to-day duties as curator, relating to exhibitions and collections, were minimized. For the rating year September 1, 1988, to August 31, 1989, Dr. Forman received a performance appraisal of "fully successful" from his supervisor. In the same performance evaluation, however, his supervisor advised Dr. Forman that he expected a "concentrated and sustained effort . . . during th[e] next year on the book project, now that it is underway." At the time, Dr. Forman had only drafted about one-half of a chapter, albeit a lengthy one.

In January 1990, Dr. Forman proposed that the one chapter he had drafted for his book on atomic clocks about Charles Townes and the maser[2] become the basis of a

---

[1] An "atomic clock" is a clock in which the "periodic process is a molecular or atomic event associated with a particular spectral line." *A New Dictionary of Physics* 94 (H.J. Gray & Alan Isaacs eds., 1975).

[2] A "maser" pre-dates the laser, but works under the same principle as a

different, shorter book, narrower in scope than the one he had originally committed to write about atomic clocks. His supervisor approved the shorter book. His interim performance appraisal (evaluating only his performance from September 1, 1989 to May 1990 for the evaluation period of September 1, 1989 to August 31, 1990), however, was "unacceptable" as to the "single critical element" of his assignment, namely to draft a "book-length manuscript." An accompanying letter from his supervisor, dated May 22, 1990, described Dr. Forman's lack of substantial progress on the promised book manuscript, focusing on a substantial period of "under productivity" in his central assignment, which was the principal area of his research during the last decade. In his final performance evaluation for the rating period of September 1, 1989 to August 31, 1990, Dr. Forman received a rating of "fully successful"; his supervisor noted that Dr. Forman had begun in the latter part of the performance year to produce "commendable draft chapters of the Townes and the Maser manuscript at a steady pace." Dr. Forman returned to work at the Smithsonian Institution in October 1990. In the next rating year, from September 1, 1990 to August 31, 1991, he again received a "fully successful" rating.

Robert McCormick Adams was the Secretary when Dr. Forman was considered for promotion in 1991. During this period, there were six principal features of the promotion process for all curators at the National Museum of American History. The Professional Accomplishment Evaluation Committee, which is a peer evaluation committee of curators

---

laser, with the generated beam occurring in the microwave region of the spectrum, which lies between infrared radiation and radio waves, rather than, like a laser, in the visible, ultraviolet, or infrared regions of the spectrum. *See A New Dictionary of Physics*, *supra*, at 335, 350. A laser is also known as an "optical maser." *Id.* at 308. Masers and atomic clocks are interrelated because the oscillations produced by a maser can provide the frequency standard for an atomic clock. *Id.* at 94.

appointed by the Director of the Museum, considers curators at Grade 13 for possible non-competitive promotion every three years. The peer review committee's recommendation is advisory to the Director of the Museum. The Director also considered other factors such as annual summary performance appraisals as well as the opinions of the curator's supervisors.[3] The Director made an advisory recommendation to the Secretary. The Secretary also customarily received advisory recommendations from his Assistant Secretaries before making his final decision. Thus, the Secretary had the final authority to make decisions regarding promotions.

In April 1991, the peer review committee recommended Dr. Forman for promotion to Grade 14. The Director of the Museum advised Dr. Forman in June 1991 that in light of the fact that none of his supervisors thought he was working at a Grade 14 level, and the primacy of a book in his performance plan since 1978, Dr. Forman would not be recommended for promotion. The Director nonetheless forwarded Dr. Forman's promotion package to the Assistant Secretary for Research. The two Assistant Secretaries, Robert Hoffman and Tom Freudenheim, reviewed Dr. Forman's promotion package. Hoffman recommended to the Secretary that Dr. Forman be promoted; Freudenheim recommended against promotion. In March 1992, after reviewing Dr. Forman's promotion package and discussing the matter with both Assistant Secretaries, Secretary Adams decided not to promote him, expressing concern that notwithstanding Dr. Forman's international reputation as an historian, he had failed to produce a book-length manuscript on atomic clocks "or any other work of comparable scope." Secretary Adams decided that consideration of a promotion should be

---

[3] Possible annual performance appraisal ratings were outstanding, highly successful, fully successful, improvement needed, and unacceptable. The evaluations considered several performance elements including research, collections, exhibits, and public and Museum service.

postponed until Dr. Forman completed "a major scholarly work such as the manuscript on atomic clocks, or his proposed biography of Charles Townes, or some other work of his choosing."

During the Secretary's discussion of Dr. Forman's promotion with the Assistant Secretaries, comments were made regarding Dr. Forman's age, generally to the effect that he might be "beyond his years of scholarly productivity"; Secretary Adams denied making these statements. Dr. Forman filed an administrative complaint of age discrimination on May 26, 1992, and upon being denied relief, he filed an administrative appeal with the Equal Employment Opportunity Commission, which was still pending when he was considered for promotion in 1995.

When Dr. Forman was next considered for a promotion in 1995, I. Michael Heyman was the Secretary and Spencer Crew was the Director of the National Museum of American History. Secretary Heyman instituted various changes in the structure and promotion process of the Museum. Secretary Heyman abolished the positions of Assistant Secretary and created in their place the position of Provost. During Dr. Forman's 1995 promotion decision, Robert Hoffman served as Acting Provost. Secretary Heyman also instituted a different decision-making system for promotions, delegating responsibility for promotions of scholarly staff to the Directors but with oversight responsibility in the Provost. Generally, the Provost could consider promotions only of persons recommended for promotion by the Director of the Museum. Dr. Crew, in turn, reorganized the Museum to shift its strategic priorities from an "academic mode" toward a "customer service" mode that would be more responsive to the public. The curatorial units were reduced from twenty to five to ensure that curators would be better aware of the interrelationship between their field of expertise and others' and share their knowledge and research with the larger public.

In April 1995, the peer evaluation committee recommended, for a third time, to the Museum Director that Dr. Forman be promoted to Grade 14. Dr. Crew, however, advised Dr. Forman that he was going to postpone his final decision until he could review the results of Dr. Forman's performance plan for 1995-96. While acknowledging the importance of scholarship, Dr. Crew stated that "other factors also weigh quite heavily," most notably the relationship of one's work to the "strategic priorities of the museum" and "the priorities of [one's] supervisor." Dr. Forman had expressed strong opposition to the new strategic priorities, and Dr. Crew explained that he wanted to determine whether Dr. Forman's performance was consistent with the new priorities of the Museum and Forman's supervisors. Dr. Crew did not forward the promotion package to the Acting Provost.

Dr. Forman submitted a complaint to Acting Provost Hoffman, claiming that Hoffman had the authority to promote him unilaterally to Grade 14. In a letter dated October 6, 1995, Secretary Heyman stated that he had requested that Hoffman advise him as to how to act on Dr. Forman's complaint; the Secretary was responding to a letter expressing concern about Dr. Forman's "long overdue promotion" and the importance to the Smithsonian of indicating that it "prize[s] scholarship, originality, and independence" as demonstrated by Dr. Forman. Hoffman turned the complaint and accompanying materials over to Assistant Acting Provost Freudenheim for a recommendation; Freudenheim responded with a memorandum, dated October 27, 1995, which Hoffman interpreted as implicitly recommending Dr. Forman's promotion. In the absence of a recommendation from the Museum Director, however, Hoffman decided to ask Dr. Crew to reconsider his decision not to recommend Dr. Forman's promotion; Dr. Crew did not respond. Although Hoffman again favored Dr. Forman's promotion in light of his research accomplishments,

he never "tested the system to determine" if he had "direct authority to overrule the museum director's recommendation," and he did not forward Dr. Forman's complaint to the Secretary, notwithstanding the Secretary's statement in October 1995 that "[Hoffman] expects to talk with all parties and then offer me guidance on how to proceed" regarding Dr. Forman's 1995 promotion. Hoffman explained that he did not forward the complaint because Dr. Forman had already filed an EEO complaint, in which a decision would be made concerning the legitimacy of his claim.

After exhausting his administrative remedies, *see* 29 C.F.R. § 1614.201(c), Dr. Forman filed a lawsuit against the Smithsonian under the ADEA, 29 U.S.C. § 633a, for age discrimination and retaliation. The district court, observing that "[i]t may very well be that [Dr. Forman] ha[d] not been treated fairly by the Smithsonian," granted summary judgment to the Smithsonian on Dr. Forman's age discrimination and retaliation claims. The district court found that Dr. Forman had failed to show that age was a factor in the Smithsonian's refusal to promote him in 1991-92. In so concluding, the district court found that the Smithsonian had articulated a legitimate nondiscriminatory reason for its decision not to promote him in 1991-92, namely his failure to produce a book or major publishable work as outlined in his performance plans, and that Dr. Forman had failed to show that this explanation was pretext for age discrimination. The district court made similar findings as to the 1995 promotion, referencing Dr. Crew's memorandum explaining why he was postponing Dr. Forman's promotion. The court found that Dr. Forman failed to show that Dr. Crew's stated explanation for postponing promotion, namely that Dr. Forman was not meeting the expectations of his supervisors or aligning with the priorities of the Museum, was a pretext for retaliation, and presumably age discrimination. The court also found no evidence of discriminatory retaliation by Dr. Crew or Acting

Provost Hoffman when he failed to forward Dr. Forman's complaint to the Secretary. In Part II we address Dr. Forman's promotion claims. In Part III we address his retaliation claims.

II.

On appeal, Dr. Forman contends that he presented a prima facie case of age discrimination because he was over forty years old when his promotions were denied, he was extraordinarily accomplished in his field, the peer committee recommended him in relation to both promotions, he presented statistical evidence that reflected preferential treatment of younger curators, and, as to his 1991 promotion, age-laden comments strongly suggested age bias. He also contends that he established a prima facie case of retaliation as to his 1995 promotion because he engaged in protected activity by filing an EEO complaint regarding the denial of his 1991 promotion, his supervisors knew of his EEO activity, and both Assistant Provost Freudenheim's memorandum and Acting Provost Hoffman's statement that he did not bring Dr. Forman's promotion to the Secretary for decision because Forman had filed an EEO challenge, constituted direct causal evidence between his protected activity and the denial of his promotion. Dr. Forman further contends that he presented sufficient evidence to discredit the Smithsonian's reasons for rejecting both of his promotions.

Our review of the grant of summary judgment is de novo. *See Tao v. Freeh*, 27 F.3d 635, 638 (D.C.Cir.1994). Accordingly, the court must view the record in the light most favorable to the nonmoving party, according that party the benefit of all reasonable inferences. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). Consistent with the courts' reluctance to become involved in the micromanagement of everyday employment

decisions, *see Brown v. Brody*, 199 F.3d 446, 451-52 (D.C.Cir.1999) (citing *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1556-57 (D.C.Cir.1997)); *Fischbach v. D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C.Cir.1996), the question before the court is limited to whether Dr. Forman produced sufficient evidence of age discrimination, not whether he was treated fairly or otherwise entitled to promotion. The Smithsonian does not dispute that Dr. Forman is highly praised by outside scholars for both his exhibits and scholarly writing and that he was generally qualified for promotion.

Section 633a of the ADEA provides that "All personnel actions affecting employees . . . in the Smithsonian Institution . . . who are at least 40 years of age . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a) (Supp. V 1999). This circuit applies to ADEA cases the scheme for allocating evidentiary burdens that has evolved in Title VII discrimination cases. *See Krodel v. Young*, 748 F.2d 701, 705 (D.C.Cir.1984). Thus, as summarized in *Cuddy v. Carmen*, 762 F.2d 119 (D.C.Cir.1985), the plaintiff must first establish a prima facie case of discrimination. *Id.* at 122. Upon so doing, the burden of production shifts to the employer to offer a legitimate nondiscriminatory reason for its action. *Id.* Upon the employer's meeting of this burden of production, the plaintiff, however, carries the overall burden of persuasion, which may be met either indirectly by showing the employer's reason is pretextual or directly by showing that it was more likely than not that the employer was motivated by discrimination. *Id.* at 123; *see Reeves*, 530 U.S. at 143, 146-47, 120 S.Ct. 2097.

The ultimate question is whether age was a determining factor in the disputed employment decision. *See Cuddy*, 762 F.2d at 123. In failure to promote cases, a prima facie case is made by showing: (1) the plaintiff is at least forty years of age; (2) the plaintiff was qualified for the position in

question; (3) the plaintiff was not promoted; and (4) the plaintiff was disadvantaged in favor of a younger person. *See Cuddy v. Carmen*, 694 F.2d 853, 856-57 (D.C.Cir.1982).

A.

Regarding the denial of his 1991 promotion, Dr. Forman presented evidence that he was a member of the protected class, he was generally qualified for promotion to Grade 14, and yet he was not promoted. He also presented evidence that he alone of all curators had been twice denied promotions in the face of two recommendations by the peer committee. To support the fourth element of his prima facie case, Dr. Forman presented expert statistical evidence to show that younger employees were favored for promotion. Specifically, Dr. Forman presented evidence that persons under forty-five years of age had a higher rate of promotion to Grade 14 than those over forty-five, and that there was an inverse correlation between a curator's age and the annual ratings given for research. These differences were statistically significant using either a one-tailed or two-tailed test of significance. *See Palmer v. Shultz*, 815 F.2d 84, 90-97 (D.C.Cir.1987). This circuit recognizes statistical data as relevant in individual discrimination claims. *See Minority Employees at NASA v. Beggs*, 723 F.2d 958, 962 (D.C.Cir.1983); *see also Bell v. EPA*, 232 F.3d 546, 553 (7th Cir.2000); *Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 423-24, 427 (7th Cir.2000). Although the Smithsonian showed that several older curators were promoted, this is not dispositive, *see O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996), and Dr. Forman maintains that the Smithsonian never disputed the overall statistical trend. The Smithsonian maintains that the statistics are deficient because they rely on an overly broad data pool, but the Smithsonian does not dispute that the statistics were based on information that it supplied in response to Dr. Forman's discovery requests.

In any event, Dr. Forman introduced other evidence that age was a primary consideration in the denial of his promotion in 1991 to meet his prima facie burden, which is not onerous. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) Dr. Forman presented evidence that when Secretary Adams was reviewing Dr. Forman's 1991 promotion papers with the two Assistant Secretaries, a series of comments were made that implicitly referred to Dr. Forman's age. According to Assistant Secretary Hoffman, comments were made that Dr. Forman may be "over the hill" or in the "twilight of his career," and may have "written his last significant article." As pointed out in *Hunt v. City of Markham*, 219 F.3d 649 (7th Cir.2000), when decision makers, or those who have input into the decision, express such discriminatory feelings around the relevant time in regard to the adverse employment action complained of, "then it may be possible to infer that the decision makers were influenced by those feelings in making their decisions." *Id.* at 653. Moreover, the employer's correlation of old age with declining productivity represents the very essence of age discrimination. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993); *cf. Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

With this evidence, Dr. Forman has presented a prima facie case that shifts the burden of coming forward with evidence to the Smithsonian to show that its action was not based on Dr. Forman's age. The Smithsonian has met this burden of production, presenting evidence that Dr. Forman was not promoted because of his failure to produce a booklength manuscript on atomic clocks "or any other work of comparable scope." Because Dr. Forman has no direct evidence of age discrimination, the dispositive question is whether he showed that the Smithsonian's explanation for its decision not to promote him in 1991 was a pretext for discrimination. *See*

*St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). Dr. Forman disputes that he was obligated to produce a book during his New York City sabbatical, and maintains that he, in fact, produced the quantitative word target set for his sabbatical and was productively focusing on Townes (but could not complete the biography because Townes was refusing access to his papers). Dr. Forman questions why completion of yet another major scholarly work was made a condition of his promotion, observing that this supposedly critical requirement vanished in later years and that completion of a book was not generally a requirement for promotion. This is insufficient evidence to show pretext.

It is undisputed that Dr. Forman's performance plans for the relevant period called for him to produce a book or comparable body of work. Dr. Forman did not produce evidence to show fulfillment of this requirement. The fact that completion of a book dropped from later promotion decisions is insufficient to show pretext because the later promotion decisions occurred under different decision makers using different procedures, having different priorities, and considering different performance evaluations. Further, the fact that Dr. Forman may have met word targets is not the equivalent of producing a final book-length manuscript; the latter, not merely the former, was specified in his performance plans, and Dr. Forman admitted that he finished neither his atomic clock book nor his Townes manuscript. Nor does Dr. Forman's inability to finish his Townes manuscript because of factors beyond his control rebut the fact that he did not produce a critical element of his performance plan for several years. Hence, notwithstanding the age-based comments at the discussion of his promotion, the Smithsonian produced evidence of a nondiscriminatory reason for denying him a noncompetitive promotion in 1991.

Dr. Forman's reliance on *Aka v. Washington Hospital Center*, 156 F.3d 1284 (D.C.Cir.1998), is appropriate to the extent it sets forth the proper legal analysis, but *Aka* highlights precisely what is missing here. In *Aka*, the plaintiff offered evidence from which a reasonable jury could find that he was "markedly more qualified" than the person selected for the position at issue. *Id.* at 1299. Dr. Forman's task is more difficult to the extent he is competing against himself. That the promotion of others did not depend on completion of a book is irrelevant to Dr. Forman's particular promotion decision. Unless he could show that he had fulfilled the central purpose of his sabbatical and performance plans, he cannot show that Secretary Adams' reason for denying his promotion was pretextual. As the district court explained to Dr. Forman:

> What is relevant is that they thought your work product or your output was inadequate, given the fact that you had no other significant responsibilities during that period of time, and that you were expected, during that two-year period of time, to produce publishable-quality written material. * * * You may disagree with their evaluation of what you were doing that period of time, but that's not age discrimination.

B.

Dr. Forman's 1995 promotion age-discrimination claim is supported by neither the statistical evidence nor the agebased remarks by decision makers that he presented in connection with the denial of his 1991 promotion. The statistical evidence, which examined only 1990 to 1993 and 1987 to 1992, does not address the relevant period, and there is no evidence to support the inference that the statistical trends during these periods extended to 1995. As to Dr. Forman's age, Dr. Crew, the Director who made the decision to postpone his decision on Dr. Forman's promotion until his performance during the upcoming year could be evaluated,

stated that he was unaware of Dr. Forman's age when he decided to postpone Forman's promotion. Although Dr. Forman maintains this denial is evidence of age discrimination, this is speculation, which is not the same as evidence showing that age was a substantial factor in Dr. Crew's decision. *See McGill v. Munoz*, 203 F.3d 843, 846 (D.C.Cir.2000); *see also* Fed.R.Civ.P. 56(e). Rather, the evidence showed that Dr. Crew focused on whether Dr. Forman would adapt to the Museum's new direction and his supervisor's expectations. Other evidence corroborates Dr. Crew's explanation. Dr. Forman had protested the Museum's new direction, thereby indicating that the Museum did have a new focus. Further, Dr. Forman's immediate supervisor had raised some of the same concerns expressed by Dr. Crew, urging Dr. Forman to collaborate more with others and do some new exhibition work and thus "expand the audiences with whom he is communicating." The evidence that Dr. Forman produced to suggest that Assistant Acting Provost Freudenheim questioned whether the Museum had such a new direction was later retracted by Freudenheim as being based on only information provided by Dr. Forman, and in any event, at most, suggests that Dr. Crew's stated explanation might be false, not that Dr. Crew's decision was age-based.

For these reasons, we hold that Dr. Forman failed to present a prima facie case of age discrimination in the 1995 denial of his promotion.

III.

We conclude, however, that Dr. Forman produced sufficient evidence to establish a prima facie case of retaliation when Acting Provost Hoffman failed to forward Dr. Forman's complaint materials in response to Secretary Heyman's request for advice on Dr. Forman's 1995 promotion. In contrast, Dr. Forman did not present a prima facie case of

retaliation as a result of Dr. Crew's failure to promote him. We first address a threshold jurisdictional issue, however, before turning to the merits.

A.

For purposes of the ADEA, the Smithsonian is included in the section addressing age discrimination in federal agency employment. *See* 29 U.S.C. § 633a(a) (Supp. V 1999). Although the court has considered whether the Smithsonian is a federal agency under certain statutes, *see Expeditions Unlimited Aquatic Enters. v. Smithsonian Inst.*, 566 F.2d 289, 296 (D.C.Cir.1977); *Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C.Cir.1997), it has yet to address whether the Smithsonian is entitled to sovereign immunity.

Several elements of the Smithsonian's congressional design would appear to suggest that it does have sovereign immunity. First, it operates under a federal charter, 20 U.S.C. § 41, and its Board of Regents is composed of or selected by federal officials, *id.* §§ 42-43. Second, it is authorized to receive appropriations from Congress. *See id.* §§ 53a, 54; *General Hearings Before the Subcommittee on Library and Memorials*, 91st Cong. 323 (1970), *cited in Expeditions Unlimited Aquatic Enters.*, 566 F.2d at 296 n. 4. Third, "[a]ll moneys recovered by or accruing to, the institution shall be paid into the Treasury of the United States, to the credit of the Smithsonian bequest, and separately accounted for," 20 U.S.C. § 53, and disbursements for payments of debt are submitted to the Treasury, *id.* § 57. Ultimately, as the Supreme Court observed in *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947), whether "a suit is one against the sovereign" turns on whether "[t]he 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Id.* at 738, 67 S.Ct. 1009 (quoting *Ex parte*

*State of New York*, 256 U.S. 490, 500, 502, 41 S.Ct. 588, 65 L.Ed. 1057 (1921)). Thus, notwithstanding that the Smithsonian is authorized to receive gifts from private sources, *see* 20 U.S.C. § 55, the Smithsonian's structure and federal funding would suggest that Congress's interest in safeguarding the public fisc from money judgments is no less significant with respect to the Smithsonian than any federal agency. *Cf. Story v. Snyder*, 184 F.2d 454, 457 (D.C.Cir.1950). Nonetheless, we do not decide the issue. Rather, in order to ensure a consistent reading of the scope of § 633a, we assume that the Smithsonian has sovereign immunity.

Consequently, before addressing the merits of Dr. Forman's retaliation claims, we must first determine whether Dr. Forman, as an employee of the Smithsonian, may bring a retaliation claim under § 633a of the ADEA. Although the Smithsonian, which is represented by the United States Attorney, does not question whether § 633a prohibits retaliation, the court must because "officers of the United States possess no power through their actions to waive an immunity of the United States or to confer jurisdiction on a court in the absence of some express provision of Congress." *Dep't of the Army v. Fed. Labor Relations Auth.*, 56 F.3d 273, 275 (D.C.Cir.1995) (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 660, 67 S.Ct. 601, 91 L.Ed. 577 (1947)); *see also First Va. Bank v. Randolph*, 110 F.3d 75, 77 (D.C.Cir.1997).

"In analyzing whether Congress has waived the immunity of the United States, we must construe waivers strictly in favor of the sovereign and not enlarge the waiver beyond what the language requires." *Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986) (citations omitted) (internal quotation marks omitted); *accord United States v. Nordic Village, Inc.*, 503 U.S. 30, 34, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992). Thus, waiver cannot be

implied; it must be unequivocally expressed. *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980); *Dorsey v. U.S. Dep't of Labor*, 41 F.3d 1551, 1554-55 (D.C.Cir.1994). Accordingly, we turn to the text of § 633a.

Congress expanded the scope of the ADEA in 1974 to include state and local governments and federal employers. *See* Pub. L. No. 93-259, 88 Stat. 74 (1974) (codified as amended at 29 U.S.C. §§ 630(b), 633a). Unlike state and local governments, which were merely added to the definition of "employer" in the ADEA, Congress created an entirely new section of the ADEA in which it waived federal sovereign immunity. This section, codified as § 633a, provides that "[a]ll personnel actions affecting [federal agency] employees . . . shall be made free from any discrimination based on age." 29 U.S.C. § 633a(a). Thus, "Congress deliberately prescribed a distinct statutory scheme applicable only to the federal sector." *Lehman v. Nakshian*, 453 U.S. 156, 167 n. 15, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981). Unlike § 623(d), the ADEA provision governing private, state, and local employers, however, § 633a does not by its terms expressly prohibit retaliation. Section 623(d) explicitly includes retaliation within the specified prohibited forms of discrimination under the ADEA, providing that "[i]t shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has made a charge, . . . or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]." 29 U.S.C. § 623(d) (1994). Moreover, the prohibition of retaliation contained in § 623(d) does not apply to federal employees not only because the ADEA defines "employer" as used in § 623(d) to exclude the federal government, *see* 29 U.S.C. § 630(b), but also because § 633a(f) specifically provides that § 633a should not be subject to the provisions of § 623.

These statutory differences between the federal and private sectors are not dispositive, however, as some courts have

concluded in holding that § 633a does not allow a claim for retaliation, *see Tomasello v. Rubin*, 920 F.Supp. 4, 5-6 (D.D.C.1996), *aff'd on other grounds*, 167 F.3d 612 (D.C.Cir.1999); *Koslow v. Hundt*, 919 F.Supp. 18, 19-21, 21 (D.D.C.1995), for it is the language that Congress used in § 633a(a) alone that determines the scope of that provision. Unlike § 623, which is narrowly drawn and sets forth specific prohibited forms of age discrimination in private employment, Congress used sweeping language when it subsequently extended the ADEA to cover federal agency employees. Congress required no less than that "[a]ll personnel actions affecting employees . . . who are at least 40 years of age . . . shall be made *free from any discrimination based on age*." 29 U.S.C. § 633a(a) (emphasis added). In enacting § 633a(a), Congress used unqualified language that encompasses a claim of retaliation because "analytically a reprisal for an age discrimination charge is an action in which age bias is a substantial factor." *See Siegel v. Kreps*, 654 F.2d 773, 782 n. 43 (D.C.Cir.1981) (Robinson, J., concurring in part and dissenting in part) (citations omitted). Congress's failure to mention "retaliation" explicitly does not undermine its intended breadth of the provision. *Cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 121 S.Ct. 1879, 1897, 149 L.Ed.2d 904, (2001); *Teva Pharm., USA, Inc. v. U.S. Food & Drug Admin.*, 182 F.3d 1003, 1011 (D.C.Cir.1999). It is difficult to imagine how a workplace could be "free from *any* discrimination based on age" if, in response to an age discrimination claim, a federal employer could fire or take other action that was adverse to an employee. To treat Congress's mandate as other than comprehensive would produce absurd results, which courts are to avoid. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982). Nothing in the plain language of § 633a suggests that Congress intended the federal workplace to be less free of age discrimination than the private workplace. To the contrary, Congress's actions show that it intended its

mandate to reach more broadly in the federal sector than in the private sector. In amending the ADEA in 1978, Congress eliminated the upper age limit for federal employees in order to effectively end mandatory retirement in the federal sector in most instances, whereas it merely increased the coverage from 65 to 70 for private employers, limiting the protection from mandatory retirement in the private sector. *See* H.R. Rep. No. 95-950, at 2, 7-8, 10-11 (1978) (Conference Report); 124 Cong. Rec. 8,218 (1978) (Sen. Javits, ranking minority member of the Human Resources Committee). Moreover, the intent of Congress as expressed in the legislative history of § 633a(a) was to "remove discriminatory barriers against employment of older workers in government jobs at the Federal and local government levels as [the ADEA] has and continues to do in private employment." S. Rep. No. 93-690, at 56 (1974); *see also* 120 Cong. Rec. 8,768 (1974) (remarks of Sen. Bentsen, principal proponent of ADEA extension to federal employees).

This focus on the sweeping language used by Congress is the same reasoning that the court relied upon in holding that § 2000e-16, in which Congress waived sovereign immunity for claims under Title VII, includes a claim for retaliation. *See Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1415 & n. 13 (D.C.Cir.1985) (citing *Porter v. Adams*, 639 F.2d 273, 277-78 (5th Cir.1981)). In *Porter*, the Fifth Circuit explained that § 2000e-16 differs from §§ 2000e-3 and 2000e-4, which are narrowly drawn and prohibit only specific forms of discrimination, because § 2000e-16 is drafted broadly to prohibit "any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16; *see Porter*, 639 F.2d at 277-78. The court reasoned that "the reasonable conclusion, therefore, is that by drafting [§ 2000e-16] to prohibit 'any discrimination,' Congress intended to bar the federal government from engaging in all those forms of discrimination identified in

[§§ 2000e-3 and 2000e-4], and others as well." *Porter*, 639 F.2d at 278; *see also White v. Gen. Servs. Admin.*, 652 F.2d 913, 917 (9th Cir.1981). Sections 633a and 2000e-16 use identical language in creating a cause of action for federal employees under the ADEA and Title VII, respectively, and thus should be interpreted consistently. Indeed, the Supreme Court has noted that § 633a, as finally enacted, is "patterned directly after [§ 2000e-16] of the Civil Rights Act of 1964, which extend Title VII protections to federal employees." *Lehman*, 453 U.S. at 167 n. 15, 101 S.Ct. 2698. Notably, the statutory pattern here favors an unqualified interpretation of Congressional intent, unlike the statutory pattern that confronted the Court in *Lehman*. *See id.* at 161, 101 S.Ct. 2698.

The fact that, unlike § 2000e-16 of Title VII, § 633a of the ADEA contains an exclusivity provision does not defeat our analysis. The exclusivity provision provides that federal personnel actions under § 633a "shall not be subject to, or affected by, any provision of this chapter," with one exception not relevant here, *see* 29 U.S.C. § 633a(f), and makes § 633a "self-contained and unaffected by other sections." *Lehman*, 453 U.S. at 168, 101 S.Ct. 2698. Courts relying on § 633a(f) in concluding that § 633a does not allow a claim of retaliation, *see Tomasello*, 920 F.Supp. at 6; *Koslow*, 919 F.Supp. at 19-20, point to the Supreme Court's language in *Lehman* that § 633a(f) means that "federal personnel actions covered by [§ 633a] are not subject to any other section of the ADEA," *Lehman*, 453 U.S. at 168, 101 S.Ct. 2698, and reason that "Congress has made clear that in interpreting section 633a, the Court may not borrow provisions from elsewhere in the ADEA." *Koslow*, 919 F.Supp. at 19-20; *Tomasello*, 920 F.Supp. at 6. The reasoning fails for two reasons.

First, nothing in the legislative history of § 633a(f), which was added to § 633a in 1978, *see* Pub. L. No. 95-256, 92 Stat. 191 (1978), suggests that it was intended to limit the

broad coverage of § 633a that was originally intended. As noted, the 1978 amendments imposed more stringent requirements upon the federal sector than the private sector.

Second, our analysis is consistent both with § 633a(f) and *Lehman*'s interpretation of it because we do not borrow provisions from elsewhere in the ADEA; rather, we rely on Congress's use of sweeping language in § 633a(a) itself to make unlawful "any discrimination" based on age, as age is defined in the ADEA. In *Lehman*, the Supreme Court considered whether a federal employee bringing suit pursuant to § 633a had a right to a jury trial. *Id.* at 157, 101 S.Ct. 2698. The Court did not hold, as *Koslow* implies, that § 633a(f) precludes courts from interpreting § 633a(a) as prohibiting the same conduct prohibited in the private sector in other provisions of the ADEA; rather, *Lehman* began its analysis with the plain language of § 633a, asking first whether it contained an express provision of a jury trial. Working against the background principle that "[w]hen Congress has waived the sovereign immunity of the United States, it has almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial," *id.* at 161, 101 S.Ct. 2698, the Court found no Congressional intent to provide federal employees a jury trial because there was no express provision for a jury trial in § 633a, whereas Congress had expressly provided for one for private employees. *Id.* at 163, 101 S.Ct. 2698. In further support of its conclusion, the Court pointed to § 633a(f), noting that, in light of Congress's emphasis that § 633a was self-contained, Congress would not have overlooked the need to provide federal employees a jury trial if it had so intended. *Id.* at 168, 101 S.Ct. 2698.

In the end, then, § 633a(f) presents somewhat of a red herring. We do not incorporate the provisions of § 623(d) into § 633a in concluding that § 633a supports a retaliation claim against the federal government. *Compare Ayon v. Sampson*, 547 F.2d 446, 449-50 (9th Cir.1976). To the

contrary, we are relying on the plain language of § 633a(a) in holding that a work place cannot be free from any age discrimination if an employer can take an adverse employment action against its employees because the employee has brought an age discrimination claim against the employer. This is age discrimination, which § 633a(a) by its *own* terms alone prohibits.

For these reasons, we hold that § 633a waives sovereign immunity as to claims of retaliation. We proceed, therefore, to address the merits of Dr. Forman's claims.

B.

The *McDonnell Douglas* framework is applicable to claims of retaliation. *See Passer v. Am. Chem. Soc'y*, 935 F.2d 322, 330 (D.C.Cir.1991); *cf. McKenna v. Weinberger*, 729 F.2d 783, 790 (D.C.Cir.1984). In order to establish a prima facie case of retaliation, a plaintiff must show that (1) he engaged in protected activity, (2) he was qualified for the promotion, (3) the employer took an adverse personnel action, and (4) a causal connection existed between the protected activity and the adverse action. *See Paquin v. Fed. Nat'l Mortgage Ass'n*, 119 F.3d 23, 31 (D.C.Cir.1997); *Mitchell v. Baldrige*, 759 F.2d 80, 86 n. 5 (D.C.Cir.1985); *McKenna*, 729 F.2d at 790. The initial burden is not great, as the plaintiff need only establish facts adequate to permit an inference of retaliatory motive. *See McKenna*, 729 F.2d at 790.

The district court was unpersuaded that Dr. Forman had made a prima facie case of retaliation. The court construed Hoffman's statement that he did not bring Dr. Forman's complaint to the Secretary "since Dr. Forman had already filed an EEO complaint, in the course of which a decision would be reached concerning the legitimacy of his claim" to be, "Let's leave it to the courts." Recognizing that Hoffman had previously supported Dr. Forman's promotion, the court rejected Dr. Forman's argument that Hoffman's statement

was *per se* reprisal and that as a result of Hoffman's inaction, Dr. Forman was deprived of consideration and procedures from which he otherwise would have benefitted. The district court erred by not viewing the evidence most favorably to Forman in granting summary judgment. Dr. Forman met his burden by presenting direct evidence of retaliatory motive. Despite Secretary Heyman's request for advice about how to proceed on Dr. Forman's 1995 promotion, Acting Provost Hoffman never forwarded Dr. Forman's complaint materials to the Secretary because, according to Hoffman himself, Dr. Forman had filed an EEO complaint about his 1991 promotion. Hoffman's explanation for not doing so was that the EEO proceeding would determine whether Dr. Forman was entitled to his promotion. While these and other evidentiary issues will remain open on remand, for purposes of summary judgment, Dr. Forman is entitled to the benefit of all reasonable inferences from the evidence before the district court.

It is true that Hoffman supported Dr. Forman's promotion. And it may be true that his failure to forward the complaint to the Secretary was in good faith. But motive, in the sense of malice, is not required for liability under the ADEA. Malicious or reckless motive is only pertinent to the issue of liquidated or double damages, which Congress intended to be punitive in nature and are not relevant here. *See* 29 U.S.C. § 626(b); *id.* § 216(b); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985); *Smith v. Office of Personnel Mgmt.*, 778 F.2d 258, 261 (5th Cir.1985); *see also* 42 U.S.C. § 1981a(b)(1). "[A]n employer may offer a legitimate nondiscriminatory reason for taking an adverse action against an employee who has engaged in protected activity. . . . However, the employer may not proffer a good faith reason for taking retaliatory action." *EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 427-28 (7th Cir.1992); *see also Hazen Paper*, 507 U.S. at

616, 113 S.Ct. 1701; *Trans World Airlines*, 469 U.S. at 126 & n. 19, 105 S.Ct. 613. Unlawful motive, not malicious motive, is all that Dr. Forman had to show.

Consequently, even if Hoffman acted in good faith in failing to forward Dr. Forman's complaint to the Secretary, he nonetheless would violate the ADEA if his reason for doing so was retaliatory, *i.e.*, in response to Dr. Forman's 1991 EEO complaint. Dr. Forman offered evidence, sufficient to defeat summary judgment, of such a retaliatory and hence unlawful motive through Hoffman's own explanation of his inaction. Hoffman's statement is direct evidence that his failure to take Dr. Forman's complaint to the Secretary was substantially motivated by Dr. Forman's prior EEO complaint and hence was retaliatory. Moreover, giving Dr. Forman the benefit of all reasonable inferences, it is unclear whether Hoffman could reasonably have thought that the pending EEO proceeding involving Dr. Forman's 1991 promotion, which turned on his failure to produce a book or book-length manuscript, would resolve Dr. Forman's complaint about the denial of his 1995 promotion, which turned on other factors, such as concern whether he would adapt to the Museum's new focus. Although Hoffman may have thought that administrative resolution of the 1991 promotion in Dr. Forman's favor would have resolved the question of promotion in 1995, an adverse resolution would have left unresolved Dr. Forman's claim of discrimination in 1995. Without a connection between the two, Hoffman's conduct could reasonably be interpreted as involving more than "leaving it to the courts."

Dr. Forman also provided evidence of the remaining elements of a prima facie case of retaliation. First, Dr. Forman's filing of an administrative complaint regarding the denial of his 1991 promotion, as well as his appeal to the Equal Employment Opportunity Commission, were protected activities. *See* 29 U.S.C. § 623; *Holbrook v. Reno*, 196 F.3d 255, 263 (D.C.Cir.1999). Second, he was generally qualified

for the promotion, and the Smithsonian does not dispute this. Third, Hoffman's failure to take Dr. Forman's complaint to the Secretary constituted an adverse employment action, viewing the record most favorably to Dr. Forman. The record before the district court showed that Secretary Heyman had delegated promotion responsibility to the Directors, but Dr. Forman introduced evidence that the Secretary had made an exception in Dr. Forman's case, expressly stating that Hoffman was to advise him on Dr. Forman's promotion. Also, the Secretary retained the authority to unilaterally promote curators. Notwithstanding the Secretary's request, Hoffman, although aware of the Secretary's statement that he was awaiting Hoffman's recommendation, never advised the Secretary how to proceed on Dr. Forman's promotion. Hoffman's reason for not acting was that Dr. Forman had filed an EEO complaint. As a result of Hoffman's inaction, a reasonable fact finder could find that Dr. Forman was denied the opportunity for promotion that the Secretary had afforded him. The Smithsonian did not contend that Dr. Forman would not have been promoted had Hoffman taken Dr. Forman's complaint to the Secretary for action. Thus, Dr. Forman's evidence that Hoffman's inaction was an adverse employment action is sufficient to defeat summary judgment for failure to establish a prima facie case of retaliation. *See Cones v. Shalala*, 199 F.3d 512, 521 (D.C.Cir.2000); *see also Ruggles v. Cal. Polytechnic State Univ.*, 797 F.2d 782, 785-86 (9th Cir.1986). Further, the Smithsonian's characterization of its action as a postponement rather than a denial is to no avail; for purposes of summary judgment, Hoffman's inaction was the equivalent of non-promotion. *See Price Waterhouse*, 490 U.S. at 233 n. 1, 109 S.Ct. 1775.

Dr. Forman's claim that Dr. Crew retaliated against him as a result of his EEO complaint fails, however, because Dr. Forman does not allege sufficient facts to show causation. Although Dr. Crew knew of the EEO complaint, his decision

not to promote Dr. Forman in 1995 occurred three years after Dr. Forman filed his EEO complaint, which challenged his non-promotion in 1991 under a different Smithsonian administration, and after changes had been made in the Museum's curatorial staff. Because of the time lapse, Dr. Forman cannot rely solely on the timing of Dr. Crew's decision not to promote him to show causation. *See Holbrook v. Reno*, 196 F.3d 255, 263 (D.C.Cir.1999); *Mitchell v. Baldrige*, 759 F.2d 80, 86 (D.C.Cir.1985). Assistant Acting Provost Freudenheim's evaluation of Dr. Crew's denial of promotion also cannot support a causal connection between Dr. Crew's failure to promote Dr. Forman and Dr. Forman's protected activity. After discussing the 1995 promotion decision with Dr. Forman, Freudenheim indicated that he thought that "it looks like [Dr. Forman] is being handled prejudicially (either because he previously sued, or because he's not part of some vague team concept), and I suspect that [the Smithsonian] will not win this one if it goes into formal legal processes." As noted, Freudenheim later qualified this statement, explaining that it was based solely on information Dr. Forman had provided and that he did not have "all of the pertinent information at [his] disposal at the time [he] expressed [his] view." Although Dr. Forman is entitled on summary judgment to have Freudenheim's initial letter credited, *see Reeves*, 530 U.S. at 150, 120 S.Ct. 2097, it is insufficient to establish causation because it is not based on personal knowledge, but rather is mere speculation. *See McGill*, 203 F.3d at 846; *see also* Fed.R.Civ.P. 56(e).

Accordingly, because Dr. Forman has established a prima facie case of retaliation, and the Smithsonian has failed to meet its burden of production to set forth a legitimate, nonretaliatory reason for Hoffman's failure to act on Dr. Forman's complaint, we reverse the grant of summary judgment on Forman's 1995 retaliation claim; we otherwise affirm. Dr. Forman's only other contention, that the district

court abused its discretion in denying him further discovery is unpersuasive in view of the wide scope of discretion accorded to the district court. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 100-01 (D.C.Cir.2001) (per curiam), *cert. denied on other grounds,* — U.S. —, 122 S.Ct. 350, — L.Ed.2d—(2001); *Carey Canada, Inc. v. Columbia Cas. Co.*, 940 F.2d 1548, 1559 (D.C.Cir.1991).

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Dec. 26, 2001]

---

No. 00-5256
September Term, 2001
96cv02735

---

PAUL FORMAN,

*Appellant*,

v.

LAWRENCE M. SMALL, Secretary,
Smithsonian Institution,

*Appellee*.

---

BEFORE: HENDERSON, RANDOLPH, and ROGERS, *Circuit Judges*.

ORDER

Upon consideration of appellant's petition for rehearing filed December 17, 2001, it is

ORDERED that the petition be denied.

*Per Curiam*

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Nancy G. Dunn
NANCY G. DUNN
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed Dec. 26, 2001]

---

No. 00-5256
September Term, 2001
96cv02735

---

PAUL FORMAN,

*Appellant*,

v.

LAWRENCE M. SMALL, Secretary,
Smithsonian Institution,

*Appellee*.

---

BEFORE: GINSBURG, *Chief Judge*; EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

*Per Curiam*

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Nancy G. Dunn
NANCY G. DUNN
Deputy Clerk

## APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed May 23, 2000]

---

C.A. No. 96-2735 (TPJ)

---

PAUL FORMAN,

*Plaintiff,*

v.

LAWRENCE H. SMALL,
Sec'y, Smithsonian Institution,

*Defendant.*

---

ORDER

In accordance with the proceedings held in open court at the hearing on defendant's motion for summary judgment on May 22, 2000, for essentially the reasons set forth upon the record, it is, this 22nd day of May, 2000,

ORDERED, that defendant's motion for summary judgment is granted; and it is

FURTHER ORDERED, that the complaint is dismissed with prejudice.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

## APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

---

C. A. No. 96-2735

---

PAUL FORMAN,

*Plaintiff*,

vs.

LAWRENCE M. SMALL,
Sec., Smithsonian Institution

*Defendant*,

---

Washington, D. C. May 22, 2000

---

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE THOMAS P. JACKSON

| | |
|---|---|
| For The Plaintiff: | Paul Forman, *Pro se* |
| For The Defendant: | Blake Workie<br>Diane Sullivan<br>Christine Nicholson |
| Court Reporter: | Phyllis Merana<br>6816 U. S. Courthouse<br>3rd & Constitution Ave., N.W.<br>Washington, D. C. 20001 |

[2] P-R-O-C-E-E-D-I-N-G-S

The Deputy Clerk: Civil Action 96-2735, Paul Forman Versus Lawrence M. Small, Secretary, Smithsonian Institution.

The Plaintiff Appears *Pro se*.

The Defendants are represented by Ms. Workie, Ms. Sullivan and Ms. Nicholson.

THE COURT: Counsel, I note that there are several preliminary motions that must be resolved before we start any trial proceedings, probably the most important of which is the pending motion for summary judgment.

Dr. Forman, I will tell you at the outset that I am extremely skeptical about your claim with respect to the 1991-'92 promotion. I doubt very seriously, on this record, whether you have undertaken to establish or you have established a genuine factual issue as to the motivation for the 1991-'92 promotion—an unlawful motivation. I am less skeptical about your claim with respect to the promotion in 1994-'95, and in that connection, I want to hear from both of you. But my tentative inclination is to grant the motion with respect to the '91-'92 promotion.

Now, with that said, I will hear anything that either of you wishes to say.

Ms. Sullivan, I guess you go first.

MS. SULLIVAN: Your Honor, Ms. Workie will argue [3] for the government on the motion, but I do have a preliminary matter with respect to the arguments. We do have witnesses, I believe, in the courtroom. And I certainly would invoke the rule on witnesses at this time.

THE COURT: All right. Those of you ladies and gentlemen in the courtroom, who anticipate being witnesses in the case, are asked, please, to retire to a witness room. There is one at the end of the corridor. Don't be shy.

MR. FORMAN: Your Honor, these are expert witnesses, and, in particular, Dr. Mann is a statistical expert. Do you intend that they also be sequestered?

THE COURT: Yes. Yes.

All right, Ms. Workie.

MR. WORKIE: Your Honor, I will just wait for them to leave.

(Witnesses Leaving Courtroom.)

MR. WORKIE: Good morning.

THE COURT: Good morning.

MS. WORKIE: The defendants request an order granting summary judgment on the grounds that no issue of material fact exists.

Plaintiff has failed to state a *prima facie* case of age discrimination. And during the 1995-'96 timeframe, six curators besides plaintiff were promoted. Three of these curators were less than ten years younger than [4] plaintiff.

And even assuming plaintiff has established a *prima facie* case of age discrimination in 1995-1996, the defendant has legitimate and nondiscriminatory reasons for not promoting plaintiff.

In 1995, plaintiff's promotion was delayed because plaintiff failed to meet the employer's legitimate and nondiscriminatory reasons and expectations of his job performance.

In 1995, the National Museum of American History, which is where plaintiff was working, went from an academic mode to one believed to be more responsive to the public.

Plaintiff has expressed opinion throughout his tenure at the national museum of America History that he opposed this new mission of the museum. It is as a result of this that a decision was made to postpone promotion, pending review of plaintiff's performance after the close of the year.

The purpose was to see whether plaintiff would meet the expectations of his supervisor, as well as to determine whether plaintiff would meet the strategic priorities of the

museum. And at the close of the period, when the time came to evaluate plaintiff, director crew did recommend promotion in 1996 when he saw that the plaintiff did meet the legitimate expectations of the employer. But, [5] again, in 1995, promotion was delayed to give management an opportunity to see how plaintiff would perform and to give management an opportunity to see whether plaintiff would follow the strategic priorities of the museum because he had shown opposition previously.

Plaintiff can produce absolutely no evidence—nowhere in the record is there any evidence discrediting defendant's articulated reasons.

THE COURT: Where are those reasons articulated?

MS. WORKIE: Okay. There is—let me pull the exhibit, and I will go ahead and point you to the specific ones.

Defendant's Exhibit 24 to its motion for summary judgment—and I will pull it out.

THE COURT: To the motion or to the reply?

MS. WORKIE: Actually, you can use either. To the reply is fine. I think those are tabbed. So it might be easier. Let me go ahead and pull that as well.

THE COURT: All right. This is the memo from Spencer Crew to Dr. Forman?

MS. WORKIE: That's correct. And if you would look at the fourth paragraph on Defendant's Exhibit 24—and I am quoting from it—it indicates, "it is imperative that the work you create parallels the expectations of your supervisors and the priorities of the museum. This has not [6] always been the case in the past and is one of the reasons assessments of your overall contribution have varied so widely. With the reorganization of the museum, you now have a new supervisor in David Allison."

And he goes on to basically indicate that he would like to see how plaintiff does the following year and then he would make the decision on whether a promotion was appropriate or not.

And, eventually, Director Crew does recommend plaintiff's promotion, but at that point in time, there was concern that plaintiff was not meeting the legitimate expectations of his employer. And there was concern that promoting him at that time would not serve any purpose because (a) he was not, again, meeting the expectations of his employer, and (b) if others in the museum could see that someone cannot do what they are supposed to do and yet be promoted, it creates a certain amount of incentive not to do what's expected.

There are also other parts of the defendant's exhibit that I can point to, if you would like. There is—I am trying to locate it. There is a memo from Director Crew about the nonpromotion, and I will find it in just one moment.

It's Defendant's Trial Exhibit Number 37. It's actually a memorandum from David Allison, who was [7] plaintiff's direct supervisor at that time, to the P.A.E.C., who reviews—a senate advisory committee that reviews curators' work. And David Allison, as the immediate supervisor, was writing a memorandum explaining how he viewed plaintiff's work.

Again, let me go ahead and get you a copy of this in case you don't have it. It's defendant's—

THE COURT: Exhibit 37. I have it.

MS. WORKIE: Okay. In the trial exhibit, there are certain parts in there—I am trying to find the sections where Mr. Allison expresses his concern.

On page 5 of Defendant's Exhibit 37, the last paragraph—and again I am quoting—it states: As indicated above, I hope we can find ways to broaden the reach of the results of Paul's work in the future. I would like to see him collaborate more

with others and do some new exhibition work. I would like to see him expand the audience with whom he is communicating.

Again, the new strategy—the new strategic priority of the museum, or I should say the emphasis of the museum when it was reorganized was to broaden its scope so that it no longer—the scholarship of someone was no longer aimed solely at a small group, but it would be wider so that the entire public could enjoy it.

And one of the concerns of the director crew at [8] that time was not only that the plaintiff did not agree with this new mission, but was not producing work that the museum thought was appropriate.

In Dr. Allison's memorandum, he makes a point of mentioning how, although plaintiff does have great scholarship, which no one disputes here, plaintiff has not—it is not clear and there is some concern from plaintiff's previous actions that he will follow the new direction of the museum and that he will perform appropriately.

THE COURT: All right. And he was, in fact, promoted in 1996?

MS. WORKIE: That is correct.

And, again, plaintiff has not shown or produced any evidence to demonstrate that defendant's reason for not promoting him in 1995 was pretext. I mean defendant had legitimate concerns. It informed plaintiff of those concerns.

And, again, in 1995, the decision was not to never give plaintiff a promotion. The decision was that we're going to delay the promotion to give plaintiff an opportunity—to basically give him an opportunity to show that he can follow the expectations of a supervisor and that he can follow the new strategy or the new strategic mission or emphasize of the museum.

[9] THE COURT: All right. Thank you, Ms. Workie.

MS. WORKIE: Thank you.

THE COURT: Now, Dr. Forman, you may address both the 1991-'92 claim and 1994 claim, if you wish to do so.

MR. FORMAN: Yes, certainly, Your Honor.

With respect to the 1991-'92 claim, Your Honor, the plaintiff has brought forward quite strong statistical evidence showing institutional disparity in evaluations and promotions related to age. And plaintiff has further—

THE COURT: You tell me what is your evidence.

MR. FORMAN: My evidence here—Dr. Charles Mann is here to testify to its statistical significance. My evidence is that promotion rates at the Smithsonian decline with age. But, more particularly, also, that the evaluations—

THE COURT: What is that probative of?

MR. FORMAN: Well, leaving that issue aside—

THE COURT: That issue is there. You're offering the statistics that promotions decline with age, which I think is probably a universal phenomenon.

MR. FORMAN: Well—

THE COURT: In the military, for example, junior officers are regularly promoted in substantial quantities—

MR. FORMAN: Yes, Your Honor. The issue—

THE COURT: —From Second Lieutenant, to [10] Lieutenant, to Major.

MR. FORMAN: The issue is not declining rates of promotion to higher grades, but the issue is rates of promotion to a given grade as a function of age. And when there is a tendency to promote younger people up from a given grade to

the next grade, but less inclination to promote older people from that given grade to the next grade, then one has a different case which could be indicative of institutional bias.

The point is that the administrative law judge strongly urged the Smithsonian to look into this matter as part of its obligation for institutional self assessment.

The Smithsonian has admitted that it took no action whatsoever to look into this circumstance.

More indicative of age discrimination in the Muse[illegible] of American History are the evaluations of curators at grades 13 and above on the research element in the years 1987 to 1992. And there again, much stronger correlation of evaluation on the research function with age. Inverse correlation was established by the statistics, the data and the statistical analysis of the data that defendant produced.

THE COURT: Now, in the defendant's memorandum in support of its motion for summary judgment, it points out that during the 1991-'92 promotion period, three curators [11] were promoted to G.S. 14. their ages were 57, 43 and 60, and you at that time were 54.

MR. FORMAN: Your Honor, there are not a lot of numbers here for the fashioning of statistics. This case is stronger with respect to the 1995 promotion when one looks at promotions at American History just at that period, but, your Honor, I would ask you to look at Plaintiff's Trial Exhibit K-3. I might hand it to you.

THE COURT: Do I have it here?

MR. FORMAN: Yes. Yes, you do, but perhaps not in a form that is readily available.

THE COURT: I have to proceed on the basis of the record before me at this point.

MR. FORMAN: I see. My apologies. You're looking at summary judgment. In that case, your Honor—

MS. WORKIE: Your Honor, just for ease, it is plaintiff's Exhibit K-4 or defendant's Exhibit 33 on the motion for summary judgment. I believe that is the document.

THE COURT: Say that again.

MS. WORKIE: Defendant's Exhibit 33 on our Motion for Summary Judgment. I believe that is the document he is referring to.

THE COURT: All right. And that's a duplicate of plaintiff's—

[12] MS. WORKIE: Plaintiff's Exhibit K-4.

THE COURT: All right.

MR. FORMAN: No. Here it is, your Honor. It is Exhibit 10 in plaintiff's opposition to defendant's motion for summary judgment, which is also Trial Exhibit K-3.

THE COURT: All right. Let me find it. Exhibit 10. All right. Okay.

MS. SULLIVAN: Your Honor, we're trying to find that exhibit. Obviously, we thought it was another one he was going to refer to.

THE COURT: I am sorry, Ms. Sullivan. What did you say?

MS. SULLIVAN: We're looking for that number, too.

THE COURT: He says it's Exhibit 10 to his opposition to the motion for summary judgment.

MR. FORMAN: What one can see there, Your Honor, is that when plaintiff was denied promotion in 1991-'92 at age 54, he was older than all of those other curators there to the left in this graph, who were promoted at younger ages, to grade 14.

And when the plaintiff was denied promotion to grade 14 in 1995 when he was 58, he was older than 20 of the 22 curators in American History promoted to grade 14.

It is from this perspective that the court, I believe, should look at the issue of age discrimination with [13] respect to plaintiff at the National Museum of American History.

THE COURT: That's the only evidence you have that your age was a factor?

MR. FORMAN: Your Honor, the decision-maker in 1991-'92 made various statements that were strongly indicative of age bias. Not only did he make such statements—and they are testified to—but his own testimony is not inconsistent with age bias in his allegation of a long-term decline in plaintiff's scholarly productivity.

Dr. Mann will testify that, statistically, there is no such. The decision-maker, Secretary Adams, was not able to point to any evidence of such. He acknowledged that the outside—

THE COURT: Point to evidence of what?

MR. FORMAN: Of such a long-term decline in plaintiff's scholarly productivity.

THE COURT: No. In 1991-'92, my understanding is that they were concerned with the fact that you had been marginally or minimally productive during a two-year period when you had been detailed to New York for purposes of preparation of a manuscript for a book.

MR. FORMAN: Well, that, too, has been alleged.

THE COURT: And everything that I have seen so far [14] confirms it. Do you deny that for two years you didn't produce what they regarded as an acceptable work product?

MR. FORMAN: Your Honor, the question of an acceptable work product is inseparable from the quality of the product. And the evidence at hand all points to high-quality

work by plaintiff at that time. And there is evidence in the record, and it will be brought out.

THE COURT: Perhaps so, but that's irrelevant.

MR. FORMAN: High quality work—

THE COURT: What is relevant is that they thought your work product or your output was inadequate, given the fact that you had no other significant responsibilities during that period of time, and that you were expected, during that two-year period of time, to produce publishable-quality written material.

MR. FORMAN: Well—

THE COURT: That was in their minds. You may disagree with their evaluation of what you were doing that period of time, but that's not age discrimination.

MR. FORMAN: Yes. Your Yonor, the plaintiff's supervisors at that time made no evaluation of the publishable quality of plaintiff's work. They made no evaluation of the quality of plaintiff's work. There were evaluations made of the quality of plaintiff's work. They were very favorable. And the plaintiff will bring, as one [15] of his expert witnesses, Dr. Harwit, who was such an expert consulted by plaintiff's supervisors in 1990, and he will testify to the high quality of plaintiff's work.

THE COURT: So be it.

MR. FORMAN: Okay. Your Honor—

THE COURT: The fact that there is disagreement as to the quality of your work does not detract from the fact that the reason that the Smithsonian did not promote you was because they didn't think it was of that quality.

MR. FORMAN: Your Honor, there is no evidence—

THE COURT: And there is no evidence that I am aware of which says that they considered your age.

MR. FORMAN: Your Honor, there is no evidence in the record that the Smithsonian did not consider the quality of plaintiff's work high, and there is plenty of evidence in the record that experts, whom they consulted, regarded the quality of the plaintiff's work as high. But—

THE COURT: The book that you were supposed to have written?

MR. FORMAN: The contributions towards that book, yes.

THE COURT: During the 1991-'92 period?

MR. FORMAN: Yes.

THE COURT: All right. You show me in the record where there is evidence that the Smithsonian thought it was [16] high.

MR. FORMAN: I will turn to a trial exhibit—

THE COURT: No.

MR. FORMAN: —which is already in the record. your honor, I offer you Defendant's Trial Exhibit 18 to simply—

THE COURT: Well, what is the number that corresponds with the exhibit to the Motion for Summary Judgment?

MR. FORMAN: Your Honor, I do not know that it is in the motion for summary judgment.

THE COURT: So it may not be in the record at all before me, is that correct?

MR. FORMAN: In this case, your Honor, I am obliged to fall back upon the investigator's report in 1992. I am sorry, your Honor. All that I can offer you is the Defendant's Trial Exhibit Number 18, which is a memorandum from Martin

Harwit, the director of the National Air and Space Museum, to plaintiff's supervisor—then-supervisor, Douglas Evelyn, Deputy Director, Museum of American History.

And this is April 30, 1990, just on the eve of the institution seeking to take action to remove plaintiff from his position. And Dr. Harwit there says, speaking of the article that plaintiff had just prepared on Townes Laser, [17] that the article is more than very good. When finished, it may even be outstanding.

The point is that plaintiff's supervisors never undertook to evaluate the quality of plaintiff's work themselves, but turned always to other experts to evaluate it in 1991. And there was never any question about the quality of plaintiff's work.

The decision-maker in 1991 never questioned the the quality of plaintiff's work.

THE COURT: How about the quantity?

MR. FORMAN: Excuse me?

THE COURT: How about the quantity?

MR. FORMAN: The truth—

THE COURT: I am looking at defendant's Exhibit Number 2 to its motion for summary judgment, which is a letter dated September 9th, 1994, from the Smithsonian E.E.O. Office. It's addressed to your former attorney, Mr. Douglas Huron, and it's entitled "notice of final decision of discrimination complaint."

It says that at the time of complaint, you were a museum curator, a GM-13, at the national museum of American History and that you had been at the grade level 13 since 1975. in the spring of 1991, you requested consideration for a promotion to grade level 14, but you did not get it. complainant's supervisors and higher-level management [18] officials all stated similar reasons for not supporting the

promotion. the reason given was that complainant—that's you—has, over the years, not met the primary goal set forth in performance plans to produce a book.

And it continues to state a finding to the effect that you were not a victim of discrimination on the basis of your age, although that had been the gravamen of the complaint that you had made in 1991 in the spring.

Now, that suggests to me, in summary fashion, that your supervisors and those who were in a position to make a decision with respect to your promotion all expressed a reason—a nondiscriminatory reason for your failure of promotion and that was that you had not produced a book which was called for in your performance plans.

Now, you show me where in the record that is contradicted and there is evidence to support a conclusion that it was your age, as distinguished from your failure to produce a book, which motivated the decision in 1991-'92 not to promote you to GM-14.

MR. FORMAN: Your Honor, not to belabor this point because I think it important to turn to the 1995 promotion denial, I would just say that Dr. Hoffmann, who met with the decision-maker, Secretary Adams, on February 10, 1992, testified that at this discussion of Forman's promotion, which promotion Hoffmann, assistant secretary for research, [19] had strongly recommended—Secretary Adams, quote, did indicate his concern that Dr. Foreman might be beyond his years of scholarly productivity, unquote, and that, quote, phrases such as "twilight of his career" or "over the hill" may have been used, unquote. This is in Dr. Hoffmann's affidavit.

Now, further on Dr. Hoffmann testified at the hearing that, quote, the secretary was persuaded in considerable measure concerning the accomplishments that Paul Forman had demonstrated, but he was concerned that maybe Paul had written his last significant article.

THE COURT: What does that have to do with age?

MR. FORMAN: Well, if there is no evidence of a decline in plaintiff's productivity, your Honor, then the supposition already suggests an age bias.

THE COURT: It suggests that perhaps you are no longer producing work that your supervisor regards as of a quality deserving of promotion to GM-14. It suggests nothing more.

MR. FORMAN: Your Honor, there is no evidence of negative appraisals of the quality of plaintiff's work in the record.

THE COURT: I just read it to you. You didn't produce a book that you were supposed to produce.

MR. FORMAN: Your Honor, perhaps were there the [20] opportunity to lay out the evidence in—

THE COURT: I am asking you to do that. I have got to make a decision on the motion for summary judgment before me, and you are obliged to do certain things, one of which is to present evidence to the effect that the express reason for your nonpromotion was mere pretext.

MR. FORMAN: Yes, that's right.

THE COURT: And evidence from which I could find, if I believed it, that you were, in fact, discriminated against because you were of a particular age, which was, at that time, 54.

MR. FORMAN: Yes. Your Honor, the issue becomes then whether the insistence on a book—a book manuscript—was a pretext. And the question then is—

THE COURT: It has got to be a pretext for age discrimination.

MR. FORMAN: Yes. Understood. Understood. A pretext for age discrimination.

Your Honor, these quoted statements are already suggestive of age bias. If I can show that the requirement of a book is a pretext, that, coupled with the indications of age bias, should allow an inference that it is a pretext for age bias.

I can show that the book is a pretext. Coupling that showing of pretext with a showing that it specifically [21] is a pretext for age bias is, I acknowledge, beyond my capacity, but together the inference is warranted.

THE COURT: Is that the best you can do?

The motion for summary judgment is granted with respect to the 1991-1992 claim.

Now, let's proceed to the 1994 claim. Counsel for the Smithsonian has pointed to several places in the record before me where those who were in a position to affect your promotion to GM-14 have expressed themselves to the effect that you simply were not ready for it at that time.

MR. FORMAN: Your Honor—

THE COURT: I have been shown a memorandum dated August 10, 1995, from Spencer Crew, who was at the time, I believe; the Director of the Museum of American History.

MR. FORMAN: Yes, Your Honor.

THE COURT: And it's addressed to you and advises, in effect, that he does not believe at this point that you are entitled to a promotion to GS-14 and that your performance will be evaluated over the forthcoming year and that by August of 1996, if your performance is in, quote, concert with the expectations of your supervisor and the strategic priorities of the museum, I will grant the promotion, close quote.

And at no point in this memorandum does he make any reference whatsoever to your age or, for that matter, [22] your being "over the hill," or in the last chapter of your career, or whatever. It has to do with your conformity with the plans for

the museum over the forthcoming year. And apparently you performed over the forthcoming year—let's see. The memorandum from Allison is dated several months before Dr. Crew's or Mr. Crew's—is that Mr. or Dr. Crew?

MR. FORMAN: Dr. Crew.

THE COURT: Dr. Crew's memorandum to you. And in the final page of his memorandum of March, 1995, he said he hopes that "we can find ways to broaden the reach of the results of Paul's work in the future. I would like to see him collaborate more with others and do some new exhibition work. I would like to see him expand the audiences with whom he is communicating."

That suggests that there are expectations for you over the forthcoming year, and that if you meet them, you will be promoted. And I gather that over the forthcoming year, you met those expectations and were ultimately promoted in 1996.

Nothing is said by Dr. Crew or by Allison to the effect that you are of an age not deserving of promotion. It all has to do with expectations with respect to your work.

MR. FORMAN: Indeed. So it appears. In the meantime—

[23] THE COURT: You have to show that's pretext.

MR. FORMAN: Your Honor, my claim with respect to the 1995 denial of promotion focuses chiefly upon retaliation, and it behooves the defendant to show that, indeed, plaintiff's performance and the activities he undertook and accomplished were significantly different in this quasi-probationary year. In fact—and now we turn to the agency's expectations—the supervisor's expectations. Plaintiff's performance plan for this probationary year shows no changes—no additions which reflect any such alleged concerns of the supervisors, in particular whereas in the preceding year—the year preceding that ended in August, '95 when plaintiff was

denied promotion, there was substantial activity in the exhibits area. In the following year, in '95-'96, there is zero responsibility for plaintiff in the exhibits area. conversely, plaintiff's responsibilities in the research area are increased in '95-'96 from half his time to more than sixty percent of his time.

Defendant alleges that plaintiff's interests in research were relatively specialized and seeks broadening them. But this can easily be shown to be a pretext.

THE COURT: If so, what record evidence shows that that is pretext?

MR. FORMAN: Director Crew was acting upon a [24] recommendation of the museum's internal peer review committee, the so-called professional accomplishments evaluation committee, P.A.E.C., this committee which had recommended plaintiff's promotion to Grade 14 in 1988, unanimously, and in 1991, unanimously, and in 1995 had recommended—half the committee had recommended plaintiff's promotion to Grade 15, or rather had rated plaintiff's performance at Grade 15.

That committee provided a detailed report of its views to secretary—to director crew. And that committee's views are shown by defendant's data to be followed in the overwhelming majority of cases. In more than nine out of ten cases, the director does exactly what the P.A.E.C. recommends that it do. not, however, in Forman's case.

Now, if one looks at this detailed appraisal by the P.A.E.C. in the spring of '95, which is in the record, it will be evident that Forman's work is of a very broad and nonspecialized character for a museum curator.

The opposition to defendant's argument, which has been put forward by defendant only in its reply memorandum to the motion for summary judgment, giving defendant not even the opportunity to bring evidence into the record—

THE COURT: To give plaintiff the opportunity?

MR. FORMAN: Yes.

[25] THE COURT: All right.

MR. FORMAN: My apologies.

THE COURT: What evidence do you have, in or out of the record, that not only director crew was wrong and that he should have accepted the recommendation of the P.A.E.C., but that the reason he didn't do it was because he thought you were too old? That is your obligation.

MR. FORMAN: Your Honor, if the reason that he didn't do it was because I had pursued an E.E.O. complaint and pursued it in a way which was notorious in the institution and which had involved supervisors from the lowest—

THE COURT: What is the evidence that he was declining to accept the recommendation of the P.A.E.C. because you had filed an E.E.O. complaint? What is the evidence of it?

MR. FORMAN: In Director Crew's case, there is—what should I say?—Only circumstantial evidence.

THE COURT: Tell me what it is. He was the deciding official?

MR. FORMAN: Yes.

THE COURT: All right.

MR. FORMAN: When his affidavit was taken by the E.E.O. investigator of plaintiff's second complaint, Director Crew alleged that he had no knowledge of [26] plaintiff's age.

Now, this is wholly implausible and, indeed, itself suggests the very opposite, since Dr. Crew had intimate knowledge of plaintiff's age discrimination complaint lodged in 1992, which came constantly to the attention of his administration through administrative actions.

But the point is that the reference here in Dr. Crew's August 10, 1995 decision memorandum already suggests an antagonism toward plaintiff around the institution on the part of supervisors, presumably connected with plaintiff having challenged an agency decision about promotion. In the third paragraph on the first page—

THE COURT: Wait a second. The third paragraph on the first page, the paragraph beginning "to date the results in all of these critical areas have been mixed"?

MR. FORMAN: Yes, Your Honor. The court: All right.

MR. FORMAN: Dr. Crew goes on to say: "Other supervisors here at N.M.A.H., or around the Smithsonian, are not of such a view."

Now, already the pointing around the Smithsonian in the question of evaluating plaintiff for promotion through his work at the Museum of American History suggests extraneous considerations, but the point is that there is [27] not in the record any memorandum from any supervisor recommending against plaintiff's promotion in 1995. And when Dr. Crew had his affidavit taken by the E.E.O. investigator, he named no supervisor who recommended against plaintiff's promotion.

So this, again, is suggestive of pretext and a reference to an ill will towards plaintiff.

THE COURT: That's pure speculation.

MR. FORMAN: Your Honor—

THE COURT: Did you take Dr. Crew's deposition?

MR. FORMAN: Your Honor, you closed discovery before I had the opportunity to do so. Your Honor—

THE COURT: Did Dr. Crew submit an affidavit?

MR. FORMAN: An affidavit?

THE COURT: Yes, Sir. Or a declaration.

MR. FORMAN: Only the affidavit taken by the E.E.O. investigator of the complaint.

THE COURT: All right. Do you know where that is?

MR. FORMAN: Yes, Your Honor.

THE COURT: Where?

MR. FORMAN: It is part of the—

MS. WORKIE: Plaintiff Exhibit 24 in the Motion for Summary Judgment or the reply. Either one.

THE COURT: 24?

MS. WORKIE: Yes.

[28] THE COURT: No, 24 appears to be the memoranda.

MS. WORKIE: I am sorry. I misspoke. I meant to say 25.

THE COURT: All right.

MR. FORMAN: It's Paragraph 13 in which Dr. Crew states that he was unaware of plaintiff's age. Paragraph 13.

THE COURT: He says: "I was unaware of Dr. Forman's age when I made my decision to withhold his promotion. Therefore, his age could not have been a factor in my decision."

Now, he says nothing about—

MR. FORMAN: But, your Honor, inasmuch as—

THE COURT: In Paragraph 14, he says that he was aware that you had filed an E.E.O. complaint. However, he says under oath, "the knowledge that Paul had filed a prior E.E.O. complaint was not a factor in my decision".

Now, where is the evidence to show that he is testifying, in effect, falsely in that declaration?

MR. FORMAN: Well, your honor, there is ample evidence precisely in the record that I pointed to, namely, plaintiff's own performance plans and the evaluations of them; that these grounds which are elaborated in defendant's 1996 affidavits given to the E.E.O. investigator are pretextual; that there was, indeed, nothing to complain of [29] in plaintiff's prior performance, and he was rated high by his supervisors; and in the probationary year, there is nothing whatsoever which corresponds to the alleged new responsibilities, duties, and goals.

And the fact of the matter is that defendant is repeatedly, throughout these proceedings also in federal court, churning up new and additional pretexts for this decision by dr. crew in 1995 including now this new pretext introduced in its reply to plaintiff's opposition to summary judgment.

THE COURT: What's the new pretext?

MR. FORMAN: The new pretext is that Dr. Crew, specifically, was concerned about the relatively specialized character of plaintiff's research, and he desired to broaden it. and this is the last page of—the last paragraph of defendant's reply to plaintiff's opposition.

What defendant has done there is pick out of Dr. Allison's spring '95 memorandum a phrase, put it into Dr. Crew's mouth, without any evidence of that in the record, and allege that this is now the reason that Dr. Crew—

THE COURT: What are you talking about here? I was reading, and have taken as an expression of the reasons for his failure to promote you, Dr. Crew's own memorandum to you of August 1995.

[30] MR. FORMAN: Yes, which says nothing about any—

THE COURT: Do you deny the authenticity of that memorandum?

MR. FORMAN: No. No, I do not, but I deny that there is anything in that memorandum which, for example, suggests that Forman's research is, and research interests, are narrow, specialized relative to what one would find among curators at the Smithsonian or the Museum of American History.

And, again, I would say plaintiff can show that this is pretextual through his witnesses—his expert witnesses.

THE COURT: What about this memorandum did you say you're going to be able to demonstrate through expert witnesses is false?

MR. FORMAN: Not about the memorandum, your Honor, but about the more specific allegation in defendant's reply memorandum to my opposition to summary judgment.

THE COURT: I am not looking at the defendant's memorandum. I am looking at the exhibits attached to the memorandum.

MR. FORMAN: Okay. My point, your Honor, is that the defendant is creating ever new pretext right now this month in its reply memorandum. And it does so not by reference to Dr. Crew's August 10 Decision Memorandum, but [31] by attributing to Dr. Crew concerns which are not specifically stated in that August 10, '95 Decision Memorandum.

Your Honor—

THE COURT: Whatever counsel have attributed to Dr. Crew, I am looking at what Dr. Crew himself has said.

MR. FORMAN: Okay. Your Honor, Dr. Crew has said extraordinarily little specifically. His observations have no specificity. They do not point to any identifiable deficiencies in plaintiff's performance. They are vague and general in the extreme. They—

THE COURT: He says he acknowledges your scholarly contributions to a field. He says, "this is an important part of

the work of a curator at this museum, but this is not an activity which alone outweighs all other responsibilities. Also of importance is the relationship of the work to the strategic priorities of the museum and the connection of the work to the priorities of the supervisors of the individual. Curators are not independent agents, but are part of a larger organization, whose priorities have to shape measurements of what are appropriate and rewardable contributions to the whole."

With respect to you, he says, "to date the results in all of these critical areas have been mixed".

MR. FORMAN: But, Your Honor, they are not mixed. [32] That's the point. There is no evidence of mixture.

THE COURT: It doesn't matter. He says he thinks they are mixed. And the fact that you are able to bring other scholars in who will say that they were not mixed and it was uniformly of admirable character does not change the fact that he is acting upon his perception, and there is nothing to show that he is not telling the truth.

MR. FORMAN: Well, but if that perception is not substantiated by any of the administrative documents in the record or any of the recommendations that have come up to him—in particular, not substantiated by plaintiff's performance evaluations in the preceding years and not substantiated by the P.A.E.C. report, and he points to nothing in particular—then the question legitimately arises whether Dr. Crew is acting out of malice, occasioned by plaintiff's pursuing an E.E.O. complaint.

THE COURT: The question is unanswerable on the basis of what you have shown me in this record.

MR. FORMAN: Your Honor, this is a case of *per se* reprisal.

THE COURT: No, it's not a case of *per se* reprisal.

MR. FORMAN: It is a case of *per se* reprisal not with respect to Dr. Crew, where it's circumstantial, but it is a case of *per se* reprisal with respect to acting provost [33] Robert Hoffmann.

THE COURT: I thought you said Dr. Crew made the decision.

MR. FORMAN: Dr. Crew made a decision. That does not mean that it was a decision which was unreviewable. And plaintiff brought the matter to the attention of the central administration. And it was brought to the central administration from various directions.

THE COURT: Are you saying that there is evidence in this record that Dr. Hoffmann discriminated against you?

MR. FORMAN: Yes.

THE COURT: All right. Where is that?

MR. FORMAN: This is in Dr. Hoffmann's affidavit given to the E.E.O. investigator in the report of investigation. it is Exhibit 12.

THE COURT: To plaintiff's reply? I mean to defendant's reply?

MR. FORMAN: Well, I don't know—no, I don't think that defendant chose to highlight this.

THE COURT: All right. Exhibit 12 to what?

MR. FORMAN: To the report of investigation of plaintiff's second E.E.O. complaint. It is in paragraph 12 of Exhibit 12 on page 5.

THE COURT: Page 5 of what?

MR. FORMAN: Your Honor, may I offer this to you? [34] This is the—

THE COURT: What are you reading from?

MR. FORMAN: I am reading from the report of investigation.

THE COURT: I am trying to find it in my file as part of the record before me.

MS. WORKIE: Your Honor, defendant's trial Exhibit Number 48, which is Exhibit Number 12.

THE COURT: All right. I don't have your trial exhibits. this is an attachment to your reply?

MS. SULLIVAN: Your Honor, if I may hand up what we would eventually submit. This is the report of investigation. It is a trial exhibit.

THE COURT: Okay.

MS. SULLIVAN: It was a report of investigation of the second complaint. I will hand you 12. I don't think there are any marks on it.

THE COURT: All right.

(Passing up to the court.)

THE COURT: Now, this is not in the record yet, but I am assuming that it would have come into the record—

MR. FORMAN: Yes.

THE COURT: —if the case goes to trial. This is an affidavit of Robert S. Hoffmann.

MR. FORMAN: Yes. It has been filed, and the [35] defendant has agreed that it can be part of the record.

THE COURT: It's dated 17 July, 1996.

MR. FORMAN: Yes.

THE COURT: Okay. You tell me what in this affidavit demonstrates that Dr. Hoffmann either discriminated against you because of your age or because you had filed an E.E.O. complaint.

MR. FORMAN: Yes. As background to this and variously in the record is Secretary Heyman's statement in October of 1995 that he was looking to Dr. Hoffmann to, quote, talk with all parties and then offer me guidance on how to proceed. This was the secretary's stated direction to Dr. Hoffmann. and Dr. Hoffmann now testifies in this paragraph 12—

THE COURT: Paragraph 12.

MR. FORMAN: The last page—the next to the last page, page 5. Okay. And the third sentence in that paragraph, beginning at the end of line 5, "I did not believe"—

THE COURT: —"that the circumstances in this case were such that I should take it to the secretary for decision since Dr. Forman had already filed an E.E.O. complaint in the course of which a decision would be reached concerning the legitimacy of his claim."

What are you suggesting to me that that proves?

[36] MR. FORMAN: It seems to me, Your Honor, to be clear that Provost Hoffmann is saying that he is going to allow the legal process to decide whether plaintiff deserves a promotion.

THE COURT: What's wrong with that?

MR. FORMAN: He is, in that, depriving plaintiff of considerations and procedures which otherwise plaintiff would have enjoyed, except that plaintiff had filed and pursued an E.E.O. complaint.

THE COURT: What he is saying is that this is now a matter for adjudication. It certainly doesn't say that he is retaliating against you because you filed an E.E.O. Complaint. he is saying, in effect, "let's leave it to the courts."

MR. FORMAN: Your Honor, if you look at the next paragraph, paragraph 13—

THE COURT: Okay.

MR. FORMAN: —I would draw from that, although it requires a little background, that Provost Hoffmann did not himself have any doubt about plaintiff's meriting the promotion to Grade 14.

THE COURT: It seems to me that he was complimentary of your accomplishments.

MR. FORMAN: But notwithstanding that he had no doubt, he, as provost, was not going to act because [37] plaintiff was pursuing an E.E.O. complaint. this constitutes *per se* reprisal.

THE COURT: I disagree. That's not reprisal. That's leaving it to the legal process.

He says in paragraph 3, "I recall telling Paul Forman sometime in 1992, after Secretary Adams' decision not to promote him, that I supported his promotion and was sorry the decision went against him."

I am having a great deal of difficulty, Dr. Forman, finding a basis to allow you to go forward with the trial of this case.

MR. FORMAN: I have nothing further to offer, Your Honor.

THE COURT: Does the defendant want to say anything further?

MS. WORKIE: Nothing further.

THE COURT: Dr. Forman, I know how important this matter is to you, and I know how diligently you have pursued it. unfortunately, I do not find any basis in this record to conclude, or from which I could, if the case were tried,

conclude that you were a victim of discrimination on the basis of your age, or a subject of retaliation for having complained that you were.

It may very well be that you have not been treated fairly by the Smithsonian. I do not know that for a fact, [38] and I am not making that observation, but it may be that you have been unappreciated at the Smithsonian. And it may be that your scholarly abilities have been unrecognized by your employer.

That in and of itself does not give you a basis to relief under the anti-discrimination laws. you plus establish not simply that you were unfairly treated, but that you were a victim of discrimination or were punished for having complained of having been a victim of discrimination. And that simply is not apparent on this record.

And so I am going to grant the motion for summary judgment and dismiss the complaint. You are entitled to take an appeal. I am sure you know that. The appeal will be made on the basis of the record which is before me and the basis upon which I have acted.

And the court of appeals decides de novo, as we say. They will take their own look at this record and see whether or not I have also mischaracterized the evidence before me as failing to establish that there is a *prima facie* base upon which to conclude that you were a victim of discrimination.

You are at liberty to take an appeal from my decision, but my decision is that i must dismiss this complaint.

[39] All right. We will stand in recess.

MS. SULLIVAN: Your Honor, because Dr. Forman is *pro se*, may I point out that we did, indeed, refer to several of the administrative records here today, and it was considered by the court. Maybe it would be appropriate for us to put the two administrative records into the record that you, indeed, took a look at.

I am a little concerned about, should he go on appeal, that we have those exhibits.

THE COURT: I gather what Ms. Sullivan is suggesting is that she is going to tender for filing, as part of the record before me on summary judgment, various administrative proceedings which might, indeed, be of assistance to you when you get to the court of appeals. I don't know.

MR. FORMAN: Yes. So I understood. and I appreciate that, Your Honor. Defendant has already filed the reports of investigation, but I look forward to the specific documents referred to as specifically included.

THE COURT: Well, then provisionally, your leave to file them as the administrative record is granted.

MS. SULLIVAN: Thank you, Your Honor.

THE COURT: Here are the Defendant's Trial Exhibits.

MS. SULLIVAN: Thank you, Your Honor.

[40] THE COURT: I would also file the affidavit of Dr. Hoffmann.

MS. SULLIVAN: I will, sir.

THE COURT: All right.

(Whereupon, the above-entitled matter was adjourned.)

CERTIFICATE OF REPORTER

This record is certified by the undersigned reported to be the official transcript of the proceedings indicated.

/s/ Phyllis Merana
PHYLLIS MERANA

**APPENDIX E**

SMITHSONIAN INSTITUTION

Performance Appraisal

| | |
|---|---|
| Paul Forman | National Musem of American History |
| (name) | (Organization) |
| Douglas E. Evelyn | 09-01-89 to 08-31-90 |
| (Rating Official) | (Period covered by appraisal) |

---

- ❑ OUTSTANDING. Performance has exceeded standards for all critical elements. Performance on non-critical elements has met or exceeded the performance standards
- ❑ HIGHLY SUCCESSFUL. Performance has exceeded the standards for 50% or more of the critical elements. Standards for remaining critical elements have been met and the standards for all non-critical elements met or exceeded.
- ■ FULLY SUCCESSFUL. Performance on all elements critical and non-critical has met or exceeded the performance standards.
- ❑ IMPROVEMENT NEEDED. Performance on all critical elements has met performance standards. However, improvement is needed to meet standards for one or more non-critical elements.
- ❑ UNACCEPTABLE. Performance on one or more critical performance elements has not met the performance standards. (Indicate action taken and/or recommended BELOW)

Comments:

During the latter part of the performance year, Paul began to produce commendable draft chapters of the Townes and the Maser manuscript at a steady pace. His essays, reviews, and lectures were well-received. The momentum on

the manuscript should be sustained as he returns to regular curatorial assignments in Washington in FY 91.

/s/ Dr. Douglas E. Evelyn 9/28/90
(Rating Official) (date)

■ I have reviewed the completed Performance Plan and the proposed Summary Appraisal. Comments if any. (Additional comments may be added by attaching a separate sheet of paper.)

/s/ Roger Kennedy 9/28/90
(Reviewing Official) (date)

■ This evaluation has been discussed with me and I have been given a copy. Comments if any. (Additional comments may be added by attaching a separate sheet of paper.)

/s/ Paul Forman 1990 Oct. 2
(Employee) (date)

Previous editions of this form are obsolete

# SMITHSONIAN INSTITUTION
## Performance Plan

Paul Forman, GS-13 Museum Curator, Appraisal Period 9/01/89 to 08/31/90

Douglas E. Evelyn

Rating Official (Initials & Date) (Reviewing Officials) (Initials & Date)

| Column I<br>Major performance Elements. Critical comments are marked with an asterisk. | Column II<br>Performance Standards (Quality, Quantity, timeliness or other Measure) | Column III<br>Actual Performance (Specific description or instances of performance in terms of the standard) | Perf. Std. (√)<br>Exceeded | Met | Not Met |
|---|---|---|---|---|---|
| 1. Book on Atomic Clocks (Primary project)<br><br>Preparation of a book on the history of atomic clocks as a study in the social integration of physics.<br><br>2. Prepares scholarly articles and review for publication (Secondary project) | Draft 50,000 words (____chapters) with "new" material and notes, etc., ready for readers and editing. Higher productivity levels at quality and degree of completeness comparable to that already produced would merit higher performance rating, i.e., 70-75,000 words (chapters) highly successful and 90-95,000 words (chapters) outstanding.<br><br>Revise essay, "Independence, Not Transcendence, for the Historian of Science, " in reponse to referees/editors criticisms/ requirements. Write review of S.S. Schweber's book MS (1500 pp), "Quantum Electrodynamics, 1946-50," for University of Chicago Press meet editor's requirements. | Standards superceded by revised performance agreement in June and monitored by me. (See 8/16/90 letter). Chapters 8 and 9 submitted on schedule, thorough, and well-develped and written. Together with earlier FY 90 material on Townes, these chapters constitute successful performance of this element.<br><br>Completed and accepted but Pau allowed to make additional changes to incorporate recent literature. FY 91 project. Completed. In addition, wrote substantial review of book on atomic clocks to be published in *Science*. | | X | |

| Column I<br>Major Performance Elements, Critical elements are marked with an asterisk(*) or other designator. | Column II<br>Performance Standards (Quality, Quantity, Timeliness or other measure) | Column III<br>Actual Performance (Specific description or instances of performance in terms of the standard) | Perf. Std. (√)<br>Exceeded | Met | Not Met |
|---|---|---|---|---|---|
| 3. Prepare and deliver scholarly lectures and papers at various universities and scholarly forums. | Papers and lectures are scholarly, instructive, and well received critically.<br>1) Provides series of three to six lectures on atomic clocks at New York University, January-April 1990.<br>2) Letures on atomic clocks at Harvard University, Department of History of Science, 1989, 11.10.<br>3) Trip to USSR, March 21-31, 1990, for discussions and presentations of research. | Prepared 3 lectures and presented at NYU, Brandeis, and CCNY.<br>Presented on subject: Townes and the Maser, Also presented "Independence Not Transcendence" papger at Harvard Graduate Seminar. | | X<br>X | |
| 4. Provides advice to Museum in subject area as requested. | Advice is timely, useful. | Met. | | | |
| 5. Provides service to profession and relevant publics | Timely and well regarded by recipients. | Served editorial board of ISIS. | | X | |

DUKE UNIVERSITY

Durham
North Carolina

DEPARTMENT OF HISTORY
104A WEST DUKE BUILDING

Postal Code 27708
Telephone (919) 684-3626

13 September 1991

Robert S. Hoffman
Assistant Secretary for Research
Smithsonian Institution
Washington, DC 20560

Dear Mr. Hoffman:

I am happy to have the opportunity to write on my perceptions of Paul Forman's standing in the scholarly community. He is an unusual scholar, in the best sense of the term, and one not likely to fit normal career patterns or professional profiles. For that reason, I believe he is probably more dependent than most on the evaluations of his colleagues. I count myself among those who value him highly and consider him a rare and important and member of the scholarly community.

I would expect that the best measure of Paul Forman's importance would be revealed by a citation analysis. We conduct these for chairs here, but not for normal promotions and appointments. Still, it might be worthwhile in Paul's case, for I expect that he is cited as much as any scholar at the National Museum of American History. I also expect that because of his soft-spoken and retiring manner he is not routinely perceived as being a staff member of particularly high visibility.

I do not specialize in 20th century physics, so I cannot begin to comment on the entire corpus of his work. I can, however, make some observations on the work I know and the perception I have of his standing in the community. He is

known as a rigorous, implacable, thoughtful scholar, who tackles tough questions, researches exhaustively, and writes with precision and care. His work is seldom easy, but it always rewards careful reading. His natural metier is the long article, which in case approaches the short book. His study of the atomic physics community in Weimar Germany, for example, is legendary. His article on post-world War II science in the United States, which I know better and understand more thoroughly, is a tour de force of subtle argumentation. While reviewing the behavior of the American physics community in this turbulent period, Forman also makes a persuasive argument that the community's agenda was dictated inappropriately by security needs and the influence of a standing military establishment that grew far too influential in national life. Not all will agree with is conclusions, but the thoroughness and insight of his analysis are undeniable.

The museum exhibits with which Paul has been involved display the same characteristic thoroughness and insight that grace his written scholarship. Long before I knew Paul personally I found myself drawn repeatedly to his exhibit on atom smashers, which I thought was a brilliant evocation of the subject matter. Much the same might be said of the exhibit on atomic clocks, which was a masterful blend of history of science and history of technology.

Paul's eccentricities no doubt impede his advancement at NMAH, as I expect they would in most environments. He is a loner at heart, always engaged in a distracting internal dialogue with himself. At times his ideas outrun his ability to articulate them clearly. Indeed, at times they outrun the comprehension of his colleagues and surely the public that visits the museum. Still, that is his genius, and from it flows the wonderful corpus of work that he has produced over the years. The Smithsonian and the NMAH are large enough institutions to harbor and nurture an eccentric of Paul's

stature and merit. I heartily endorse him for whatever promotion it is within your power to bestow. He is a jewel, and an ornament to the museum.

Sincerely,

/s/ Alex Roland
ALEX ROLAND
Professor

CALIFORNIA INSTITUTE OF TECHNOLOGY

DIVISION OF THE HUMANITIES AND SOCIAL SCIENCES 228-77

THE J.O. AND JULIETTE KOEPFLI
PROFESSOR OF THE HUMANITIES

Telefax No.
818-405-9841

September 8, 1991

Dr. Robert S. Hoffmann
Assistant Secretary for Research
Smithsonian Institution
Washington, D.C. 20560

Dear Dr. Hoffmann:

To respond to your letter of August 19, I am very glad to provide an assessment of Paul Forman's accomplishments in connection with your periodic review of his professional work. I regard Paul, whom I have known for about twenty-five years, as one of the very best historians of modern physics on either side of the Atlantic. He is widely read both in the history of science and history in general. He is also completely literate in the technical side of modern physics, and yet is thoroughly at home in its modern political and institutional history in several countries, especially Germany, Britain, and the United States.

As a scholar, Paul is brilliant, strong-minded and intellectually adventurous, at once a master of both primary and secondary sources and imaginatively original. He has made major contributions to scholarship in his field. The collaborative work with Heilbron and Weart is a landmark in the quantitative history of physics, one that opened my eyes to the importance of cross-national comparative analysis in the history of science. Several of his articles are classics. I have in mind in particular "Weimar Culture, Causality, and Quantum Theory" (with which I happen to disagree), "The Doublet Riddle . . . .," and "Behind Quantum

Electronics . . . " (with which I also disagree). I hasten to add the my disagreements in no way diminish my admiration and respect for these pieces of work. All are striking essays in how one might profitably approach the intellectual sociology and politics of science, particularly the merger of so-called internal and external history.

I have seen only one of Paul's museum exhibitions ("The Atom Smashers"); I thought it of exceptionally high quality, a remarkable artifactual expression of scholarly knowledge. His work with exhibitions have led him to an appreciation for, and knowledgeability concerning, the role of instrumentation in the history of science, and that has stimulated him to move into highly significant new areas of work. His paper on atomic clocks breaks important new ground in the history of the relationship among quantum physics, instrumentation, and industry. (It was this work that moved him to consider the development of quantum electronics after 1945 in the context of military support of physics and produce his extensively researched article on the subject.) I anticipate that the two books—on Townes and on the maser—on which he is now working will be incisively important works.

As a professional colleague, Paul has been very helpful and generous whenever I have called upon him (some years ago he gave the manuscript of my book THE PHYSICISTS a close critical reading), and I understand that he has been equally generous with others, including younger people entering the field.

Sincerely,

Daniel J. Kevles

THE JOHNS HOPKINS UNIVERSITY

[LOGO]

Department of
The History of Science

Gilman Hall
Baltimore, Maryland 21218
(301) 335-7501

September 12, 1991

Dr. Robert Hoffmann
Assistant Secretary for Research
Smithsonian Institution
Washington, D.C. 20560

Dear Dr. Hoffmann:

I am happy to comment on Paul Forman's scholarly contributions for your Professional Achievements Evaluation Committee. Simply put, Forman is the best historian of science at the Smithsonian, and one of the two or three best historians in any field, in any of the museums. From his early studies of physics in Weimar Germany to his latest work on physics in the national security state, Forman's scholarship has consistently anticipated important new directions in our field, and consistently forced us to face important new questions and opportunities.

Forman may not have been as prolific as some historians, but virtually every one of his major articles has been a classic, heavily cited and deeply influential. He was asking fresh questions about the relationship of culture to the most technical levels of quantum physics a decade before the current rage for the sociology of knowledge. His volume on the funding and output of academic physics, with Heilbron and Weart, will be mined by scholars for years to come. His seminal "Behind Quantum Mechanics" has largely set the terms for a debate about the role of the state in shaping science that has extended far beyond the historical community. A brief glance at the number of times that piece was cited in a recent volume on the university and the

military published by the American Academy of Political and Social Sciences suggests the kind of audience he is reaching. Forman's "Independence, Not Transcendence," stands as one of the most moving pleas for the social responsibility of the historian I have read in some time. And his ongoing research on the maser and on measurement promises to continue this tradition of asking original questions and exploring new sources.

I am less familiar with Forman's exhibit work. I did see "Atom Smashers" and considered it a masterful combination of scholarly rigor and public education. In fact it's the only exhibit I recall footnoting. I also happened to see the small display on the fall of parity while I was working at the National Bureau of Standards (now NIST), and was once again impressed by its clear explanation of a difficult but important topic. The Bureau people I saw reading the text and examining the apparatus also genuinely seemed to appreciate the exhibit and its insight into their history. Parenthetically, the Smithsonian might consider sending similar displays on the road.

Forman has always gone out of his way to assist those of our graduate students who have found their way to the National Museum of American History as predoctoral fellows, summer interns, or researchers. He recently served on a dissertation committee for one of my students, giving generously of his time and ideas without any compensation beyond the pleasures of watching his insights take root and grow. I suspect he has done the same for many other students over the years.

Forman has remained exceptionally active as an editor, as a conference and session participant and organizer, and as someone encouraging younger scholars in the field. I cannot remember attending one of the evening seminars at the Air and Space Museum where he was not in attendance, and usually the major contributor to the discussion.

Without question, Forman has been, and continues to be, a major scholarly presence at the Smithsonian, a man whose work commands widespread attention and respect, the kind of historian who could join any top university department in the country. He embodies the highest standards of professional scholarship and personal integrity. He is a credit to your Institution.

Sincerely yours,

/s/ Stuart W. Leslie
STUART W. LESLIE

Department of History
University of California Irvine
Irvine CA 92717
(work: 714-856-6317, 6521;
home: 714-756-8277;
FAX: 714-725-2865)

16 October 1991

Dr. Robert S. Hoffmann,
Asst. Secretary for Research
Smithsonian Institution
Washington DC 20560

Dear Dr. Hoffann:

Re: Paul Forman

Since taking his Ph.D. in 1967, Paul has been a leading scholar, exhibitor, critic, and role model within the history of science. Widely known and respected in the broad community, he is a major participant within the subcommunity of historians of modern physics. Only two members of this subcommunity have had a greater influence on its development—Thomas Kuhn, the most prominent historian of science since the appearance of the *Structure of Scientific Revolutions* and John Heilbron, an exceptionally wide-ranging and prolific scholar and teacher. While less famous than Tom and John, Paul has been their equal or more in setting standards of originality, craftsmanship, and integrity.

As scholar, Paul has been and continues to be resourceful, original, sound, and interesting. His dissertation (1967) provided me and many others with a model for thinking about how to relate social to scientific developments. *Physics circa 1900* . . . (1975) has served as a benchmark in my courses on twentieth-century physics and inspired several historical assessments of social-institutional support for various disciplines. "Weimar Culture . . ." (1971) and "Behind Quantum Electronics . . ." (1987) are classics that have laid out

significant new lines of research. "Independence, not Transcendence . . ." (1991) is a provocative piece that asks historians of science to reconsider their tendency to approach their subjects with a celebratory mindset.

As exhibitor, Paul was brilliant. He showed historians and physicists that it was possible to create exhibits for the public that were at once accessible and faithful to the complexities of their subjects and original in their presentation of text, graphics, and documents. "Atom Smashers" (1977) was a tour de force that drew public as well as scholarly attention to the significance of detectors. "Einstein" (1979) managed, despite the difficulties of preparing an exhibit on a theorist, to provide fresh insights on Einstein's work and life. "Atomic Clocks" (1982) was the most original, and difficult, of his early exhibits. It not only opened up a new field for historical investigation but also did a fine job of placing the development of atomic clocks within its Cold War context. Unfortunately, I missed Paul's exhibit on Townes.

As critic, Paul can be extraordinarily severe. His review (1983) of Mehra and Rechenberg, for example, was savage. Yet it was entirely fair, and necessary, for Mehra and the many prestigious physicists whom he had hoodwinked were touting the book as a historical breakthrough. Although he does not hesitate to denounce shoddy work, Paul is ready and willing to praise those whose work has informed or stimulated him. His "Sarton Medal Citation" for Hunter Dupree (1991) is a wonderful encomium that will justly lead many of the younger generation to read or reread Dupree's works.

Finally, Paul has served many peers and younger scholars as an inspiration. His publications, letters, and conversations have inspired me time and again to look more deeply into and write more carefully about the past. I know from talks with many younger historians of science in Washington, elsewhere

in the country, and in Europe that I have been just one of many who has drawn such inspiration from him.

In sum, I regard Paul as the Smithsonian's luminary in the history of science.

Sincerely,

/s/ Karl Hufbauer

KARL HUFBAUER

Prof. Hist. of Science

UNIVERSITY OF CALIFORNIA, BERKELEY

[SEAL]

OFFICE OF THE CHANCELLOR BERKELEY, CALIFORNIA 94720

October 1, 1991

Mr. Robert S. Hoffmann
Assistant Secretary for Research
Smithsonian Institution
Washington, D.C. 20560

Dear Mr. Hoffmann:

Thank you for the opportunity to comment on the depth and originality of Dr. Paul Forman's scholarly work. In both particulars he is at the very top of his profession, internationally (as the translations of his work indicate) as well as domestically.

Sincerely,

/s/ J.L. Heilbron
J.L. HEILBRON
The Vice Chancellor

MEMORANDUM

Date: November 5, 1991

To: Roger Kennedy, NMAH
From: Robert S. Hoffmann
Assistant Secretary for Research
Re: Review of Paul Forman

It has been five months since I received your memorandum of 5 June 1991 asking me to review both the PAEC assessment of Paul Forman's scholarly attainments, as well as the views of Bill Withuhn, Art Molella, and Doug Evelyn. At that time, you said that if I concluded that the PAEC recommendation was warranted, you would "not resist that promotion." I was away much of the months of June and July, and could not properly focus on the issue until mid-summer. Then, having read all of the materials submitted to me, I asked Paul Forman to provide me with copies of several articles that had been left out of the promotion package, as well as an up-to-date curriculum vitae. I also wrote at that time to six more scholars in the area of history of science that I had chosen, and whose opinions I felt commanded widespread respect. These names were not recommended to me by Forman, nor by any of your colleagues, as I was interested in views that were as much objective and outside the on-going controversy that has enveloped this issue as possible. I have finally received responses from all of these individuals.

I have attached copies of these letters of evaluations for your files. If you read them, I think you will see that a number of highly-respected scholars hold a very high opinion of Paul Forman's work, and not based simply on the strength of the reputation that he had established earlier. While I am mindful of the various legitimate points that Paul's supervisors have raised concerning "standards of accountability," related to his failure to yet complete the

project that was the principal activity in his performance plans, I also feel obliged to look, as the PAEC did, at his entire career at NMAH. In doing so, I come to the decision that Paul Forman has reached a level of scholarly attainment such that promotion to grade 14 is appropriate.

In reaching this decision, I have tried to separate out the considerable baggage of grievance, clash of personalities, and a long history of accusations, disappointments, charges and counter charges. It is not easy to do this, of course, and I readily admit that I may have been influenced in ways that I cannot recognize. Nevertheless, I believe that someone who is clearly considered by the best of his peers as one of the best historians of modern science, both in his scholarly writings and in the exhibitions he has curated, is deserving of a grade 14. I know that this has been difficult for you, as it has been for me. I hope you will not interpret my decision in this highly individual case as indicative of lack of respect for, or support of, your directorship. Nevertheless, I believe (in the words of Alex Roland) that "the Smithsonian and the NMAH are large enough Institutions to harbor and nurture an eccentric of Paul's stature and merit."

Please let me have your reaction to my decision; I have not yet forwarded the promotion package to the Secretary.

Attachment

Supreme Court, U.S.
FILED
MAY 23 2002
OFFICE OF THE CLERK

No. 01-1446

# In the Supreme Court of the United States

PAUL FORMAN, PETITIONER

*v.*

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
*Solicitor General*
*Counsel of Record*
ROBERT D. MCCALLUM, JR.
*Assistant Attorney General*
MARLEIGH D. DOVER
RICHARD A. OLDERMAN
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

13 pgs

## QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's grant of summary judgment for respondent on petitioner's claim that age discrimination was the reason he was not promoted to a GS-14 position in 1991.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 10 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973) | 5, 6 |
| *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) | 6, 7 |
| *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502 (1993) | 6 |


Statute:


| | |
|---|---|
| Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a (1994 & Supp. V 1999) | 4 |

# In the Supreme Court of the United States

No. 01-1446

PAUL FORMAN, PETITIONER

*v.*

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 271 F.3d 285. The order of the district court granting summary judgment (Pet. App. 30a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on November 16, 2001. Petitions for rehearing were denied on December 26, 2001 (Pet. App. 28a, 29a). The petition for a writ of certiorari was filed on March 26, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a curator of modern physics at the National Museum of American History in Washington, D.C., which is part of the Smithsonian Institution. Pet. App. 2a. In May 1988, he requested that he be temporarily assigned to a duty post in New York City, for a period of two years, so that he could prepare a draft of a book on the history of atomic clocks. *Ibid.* This request was approved, and petitioner began his assignment in New York City in August 1988. *Ibid.*; Pet. 4; Defendant's Statement of Material Facts Not in Dispute (Statement of Material Facts), para. 11. In rating petitioner's performance for the year September 1, 1988, to August 31, 1989, petitioner's supervisor made clear that he expected a "concentrated and sustained effort" on the book. Pet. App. 2a. Unable to complete the task, petitioner proposed in January 1990 that, having drafted only one chapter of the proposed book, he write a shorter book that would be narrower in scope than the book originally planned and would focus upon one inventor, Charles Townes. *Id.* at 2a-3a; Pet. 4. Although this change was approved, petitioner's interim performance appraisal was "unacceptable" as to the "single critical element" of his assignment, which was writing the book. Pet. App. 3a. His final performance appraisal was "fully successful," because he had begun to write "commendable draft chapters" of the newly proposed book. *Ibid.* Petitioner failed to achieve the higher performance ratings of "outstanding" or "highly successful." See *id.* at 4a n.3. Petitioner returned to work in Washington, D.C., in 1990, with the book still not completed. *Id.* at 3a. For the 1990-1991 rating year, petitioner again received only the "fully successful" rating. *Ibid.*

In April 1991, a peer review committee recommended that petitioner be promoted to GS-14. Pet. App. 4a. The Director of the Museum of American History (the Director) declined to recommend that petitioner be promoted because none of petitioner's supervisors believed he was working at a GS-14 level, and petitioner had failed to complete the book which had been a primary performance goal since 1978. *Ibid.* Petitioner, accordingly, was not promoted. *Id.* at 4a-5a.

Petitioner filed a timely EEO complaint in 1992, alleging that he had not been promoted to a GS-14 position because of age discrimination. Pet. App. 5a. After a two-day hearing, the Administrative Law Judge recommended a finding of no discrimination. The Smithsonian adopted this as its final agency decision. On September 12, 1996, the Equal Employment Opportunity Commission's (EEOC) Office of Federal Operations affirmed the Smithsonian's final decision. Statement of Material Facts, para. 1.

2. In 1995, petitioner was again considered for promotion to GS-14. Pet. App. 5a. While the peer evaluation committee again recommended that petitioner be promoted, a new Secretary of the Smithsonian and a new Director had taken over and made substantial institutional changes. They had reduced curatorial units, abolished certain positions, and instituted a different process for making promotion decisions. *Ibid.* They had also changed the Museum's priorities, from "academic mode" to "customer service" mode. *Ibid.* In order to allow determination of whether petitioner's performance warranted granting petitioner a promotion under the new priorities and structure, the final decision on petitioner's promotion was postponed for one year. *Id.* at 6a. Ultimately, petitioner was pro-

moted to Grade 14 in 1996, when he was 59 years old. *Id.* at 2a.

3. In February of 1996, petitioner filed a timely EEO complaint, charging that the failure to promote him in 1995 was due to age discrimination, and was a reprisal for his previous EEO complaint. Statement of Material Facts, para. 2. Although he had already been promoted to the GS-14 position, petitioner thereafter filed this lawsuit against respondent pursuant to the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a (1994 & Supp. V 1999). He sought promotion retroactive to 1991, "together with all back pay and related benefits and promotions that would have accrued, including promotion to GS 15." Statement of Material Facts, para. 6. After the filing of this lawsuit, petitioner's administrative EEO complaint was dismissed. *Id.* para. 2.

4. After allowing discovery, the district court granted respondent's motion for summary judgment, ruling that petitioner had failed to produce sufficient evidence upon which a fact-finder could conclude that he was the victim of either age discrimination or retaliation. Pet. App. 59a. The court ruled that respondent had articulated a legitimate, non-discriminatory reason for its decision not to promote the petitioner in 1991-1992, which was his failure to produce a book, as was provided for in his performance plan. *Id.* at 44a. The court also ruled that respondent had articulated a legitimate non-discriminatory reason for the failure to promote in 1995, and that petitioner had failed to show that respondent's explanations were a pretext for age discrimination or retaliation. *Id.* at 58a-59a.

5. The court of appeals affirmed in part and reversed in part. With respect to the failure to promote in 1991, which is the sole issue raised in the petition for certio-

rari (Pet. 2-3), the court of appeals ruled that petitioner had produced no direct evidence of age discrimination, but had nonetheless met his initial burden of production, a burden "which is not onerous." Pet. App. 11a. While the court acknowledged that petitioner had introduced statistical evidence, and evidence of age-based comments during the period of his evaluation for the GS-14 position,[1] the court concluded that respondent met its burden of production under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), by articulating a legitimate non-discriminatory reason for his non-promotion—the failure of petitioner in his principal responsibility of producing a booklength manuscript—and presenting evidence to support its contention. Pet. App. 11a-12a.

The court also determined that the reason given by the Smithsonian was not a pretext. "It is undisputed," wrote the court, "that Dr. Forman's performance plans for the relevant period called for him to produce a book or comparable body of work. Dr. Forman did not produce evidence to show fulfillment of this requirement." Pet. App. 12a. The court observed that "Dr. Forman admitted that he finished neither his atomic clock book nor his Townes manuscript. * * * Hence, notwithstanding the age-based comments at the discussion of his promotion, the Smithsonian produced

---

[1] Petitioner submitted statistical evidence that, although several older Smithsonian curators were in fact promoted, in general Smithsonian employees under 45 years of age had a higher rate of promotion to the GS-14 level than those over 45 years of age. See Pet. App. 10a. He also submitted anecdotal evidence, contested by respondent, that comments were made during the 1991 consideration of his promotion that he might be in the "twilight of his career" and may have "written his last significant article." See *id.* at 11a.

evidence of a nondiscriminatory reason for denying him a noncompetitive promotion in 1991." *Ibid.*

The court went on to hold that petitioner failed to present a prima facie case of age discrimination with respect to the 1995 denial of his promotion, but held that petitioner had produced sufficient evidence to make out a prima facie case of retaliation. Pet. App. 14a-15a. The court thus reversed the grant of summary judgment on the retaliation issue, and remanded for further proceedings. *Id.* at 26a-27a.[2]

**ARGUMENT**

Petitioner contends that, in considering the failure to promote him in 1992, the court of appeals misapplied the standards for determining whether a plaintiff seeking a non-competitive promotion has established a violation of the ADEA. The court of appeals, however, applied the settled standards for resolving that issue, and its fact-bound application of those standards raises no issue warranting this Court's review.

1. Courts addressing ADEA claims apply the burden-shifting framework announced in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and refined in later cases. See, *e.g.*, *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000). *McDonnell Douglas* and its progeny establish "an allocation of the burden of production and an order for the presentation of proof in * * * discriminatory-treatment cases." *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506 (1993). "First, the plaintiff must establish a prima facie case of

---

[2] The court also stated, in a separate section of its decision, that the ADEA provides a cause of action for retaliation when the plaintiff is a federal employee. Pet. App. 16a-22a. That issue, like petitioner's age discrimination claim arising out of the events of 1995, is not before the Court for review. Pet. 2-3.

discrimination." *Reeves*, 530 U.S. at 142 (citations omitted). If the plaintiff makes out a prima facie case, the burden then shifts to the defendant to produce evidence of a legitimate, non-discriminatory reason for its actions. *Ibid.* If the defendant carries this burden, which is a burden only of production, and not persuasion, "involv[ing] no credibility assessment," *ibid.* (internal quotation marks and citations omitted), the *McDonnell Douglas* framework and its presumptions and burdens disappears. *Id.* at 142-143. The plaintiff must then satisfy its "ultimate burden"—to "persuad[e] the trier of fact that the defendant intentionally discriminated against the plaintiff." *Id.* at 143 (internal quotation marks and citations omitted). The plaintiff must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Ibid.* (internal quotation marks and citations omitted).

2. Petitioner asserts that the court of appeals applied different standards in this case, involving a non-competitive promotion, than it would have had a competitive promotion been at issue. This contention is without merit. The court of appeals correctly applied the *McDonnell Douglas* and *Reeves* framework in resolving petitioner's ADEA claim regarding the failure to promote him in 1991. The court did distinguish petitioner's case from an earlier case the court of appeals had heard, in which the plaintiff had presented evidence showing that he was "markedly more qualified" than the person ultimately selected. Pet. App. 13a (citation omitted). The court merely pointed out that the particular tasks others who were promoted may have or may not have completed were not relevant to showing discrimination where petitioner had failed to "fulfill[]

the central purpose of his sabbatical and performance plans." *Ibid.* The court took into account the circumstantial evidence introduced by petitioner to support his claim of discrimination and held that petitioner "has presented a prima facie case that shifts the burden of coming forward with evidence to the Smithsonian to show that its action was not based on [petitioner's] age." *Id.* at 11a-12a. The court then determined that the Smithsonian met its burden of production by "presenting evidence that [petitioner] was not promoted because of his failure to produce a booklength manuscript on atomic clocks 'or any other work of comparable scope.'" *Ibid.* The court went on to note, correctly, that "[b]ecause [petitioner] has no direct evidence of age discrimination, the dispositive question is whether he showed that the Smithsonian's explanation for its decision not to promote him in 1991 was a pretext for discrimination." *Ibid.* The court then found insufficient evidence to show pretext. "It is undisputed," wrote the court, "that [petitioner's] performance plans for the relevant period called for him to produce a book or comparable body of work. [Petitioner] did not produce evidence to show fulfillment of this requirement. * * * Dr. Forman admitted that he finished neither his atomic clock book nor his Townes manuscript." *Id.* at 12a.

In sum, the court applied the burden-shifting standards of *McDonnell Douglas* as it would in any discrimination case, taking into account all the circumstantial evidence presented by the petitioner. It determined that, based on the record in this case, petitioner's evidence was insufficient to permit a reasonable factfinder to conclude that the decision not to promote him to a GS-14 level reflected an intent to discriminate on the basis of age. Thus, while petitioner asserts that, in

addressing pretext, the court of appeals treated the explanation put forward by respondent—that petitioner failed to complete a booklength manuscript—"as unassailable by any means other than direct demonstration of its falsity" (Pet. 8), this assertion is wrong. The petitioner simply did not satisfy his burden of production because he did not come forward with any evidence to suggest that the reason articulated for his not getting the promotion was pretextual. He did not present evidence that, for example, he was fully engaged in curatorial responsibilities even as he attempted to write the proposed book, and thus should not have been denied a promotion, or that other curators had been promoted despite failure to meet the central purposes of their performance plans. As both lower courts correctly found, the preparation of a booklength manuscript was petitioner's "primary task" for two years, and thus "[h]is normal day-to-day duties as curator, relating to exhibitions and collections, were minimized." Pet App. 2a. The court took into account petitioner's evidence, but ultimately found no showing of age discrimination. Since no trier of fact could find age discrimination on this record, and since the court applied the correct legal standards, certiorari should be denied.

3. Petitioner further contends that the court of appeals' decision conflicts with the holdings of other circuits. Pet. 18. But because, as explained above, the court of appeals did not apply any law to petitioner's claim arising out of the events of 1991, other than the well-established *McDonnell Douglas* framework, no circuit split requiring resolution has been created.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
*Solicitor General*
ROBERT D. MCCALLUM, JR.
*Assistant Attorney General*
MARLEIGH D. DOVER
RICHARD A. OLDERMAN
*Attorneys*

MAY 2002

Supreme Court, U.S.
FILED
JUN 7 2002
OFFICE OF THE CLERK

No. 01-1446

IN THE

# Supreme Court of the United States

PAUL FORMAN,
*Petitioner*,

v.

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONER'S REPLY BRIEF

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

*Attorneys for Petitioner*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

12p

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| PETITIONER'S REPLY BRIEF | 1 |
| CONCLUSION | 8 |

# TABLE OF AUTHORITIES

CASES Page

*Hunt v. Cromartie*, 526 U.S. 541 (1999) ..... 7
*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ..... 1, 5, 7
*Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ..... 1, 3, 4, 7
*Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) ..... *passim*
*St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) ..... 7
*Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) ..... 2, 7
*University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182 (1990) ..... 5

IN THE

# Supreme Court of the United States

No. 01-1446

PAUL FORMAN,

*Petitioner*,

v.

LAWRENCE M. SMALL, SECRETARY,
SMITHSONIAN INSTITUTION,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## PETITIONER'S REPLY BRIEF

The Solicitor General affects a back-of-the-hand approach to this case, suggesting that it is a routine, fact-bound affirmance of summary judgment. It is not.

The Court of Appeals flouted the method for assessing pretext that this Court has carefully fashioned over three decades in such cases as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Because the appellate court's disregard of this precedent cannot be defended, the government does not attempt to do so. Instead, it simply pretends that nothing is amiss.

In fact, the approach to pretext taken by the Court of Appeals requires correction. This can be accomplished either through full proceedings on the merits or, if the Court deems it appropriate, through summary reversal.

## I.

This Court has emphasized that the plaintiff's initial burden to establish a prima facie case of discrimination is "not onerous." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Nor is the defendant's responsive burden to articulate a legitimate, nondiscriminatory reason for the challenged conduct. *Id.* at 254-55. The heavy lifting comes after both preliminary burdens have been satisfied, when the plaintiff has "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision." *Id.* at 256. And if the plaintiff succeeds in this endeavor, "it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Reeves*, 530 U.S. at 147 (emphasis in original).

In trying to prove pretext at the third stage of this analytical framework, the plaintiff has not "expended"—like so much ammunition—the evidence that he brought forward at the first stage. The slate is not wiped clean. On the contrary, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Reeves*, 530 U.S. at 143, *quoting Burdine*, 450 U.S. at 255 n.10.

In the present case, however, the Court of Appeals treated each of the three stages of proof as hermetically sealed. This was fundamental legal error—the same error condemned in *Reeves*, where "the Court of Appeals ignored the evidence supporting petitioner's prima facie case." 530 U.S. at 146. Here as well, the Court of Appeals first cited a wealth of

proof when considering petitioner's prima facie case—including both unchallenged statistics and comments redolent of age bias, Pet. App. 10a-11a—then ignored all this evidence in assessing pretext. *Id.* at 12a-13a.

Perhaps unwittingly, the government replicates this error, saying that petitioner did "not satisfy his burden of production because he did not come forward with *any evidence* to suggest that the reason articulated for his not getting the promotion was pretextual." Brief in Opposition (Br. Opp.) at 9 (emphasis added). That is just not so. Under *Reeves*, the proof amassed in support of petitioner's prima facie case also qualifies as evidence of pretext.

In addition, petitioner separately advanced other probative evidence. Most telling, he showed that the government's central argument—that he had not fulfilled his performance plan—was simply wrong. For the performance year ending August 31, 1990, the principal element in petitioner's performance plan was the preparation of a book on atomic clocks. And his supervisor said that the "commendable draft chapters" that petitioner had written, Pet. App. 61a, "constituted successful performance of this element." *Id.* at 63a (Column III). He did not thereafter complete the book, which had evolved into a biography of Charles Townes, but it is undisputed that this was because "Townes was refusing access to his papers." *Id.* at 12a.

The government imagines evidence of pretext that petitioner might have offered, "for example, [that] he was fully engaged in curatorial responsibilities even as he attempted to write the proposed book, and thus should not have been denied a promotion." Br. Opp. at 9. Certainly this would have been solid proof of pretext, but "[t]he evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms." *Patterson*, 491 U.S. at 187. And the government's hypothetical is no more powerful than the true reason,

namely, as the Court of Appeals itself states, that petitioner was unable "to finish his Townes manuscript because of factors beyond his control." Pet. App. 12a.

In fact, the government is more lenient in its evidentiary standards than the Court of Appeals. For the court, the fact that no book was produced ended the inquiry: "Unless [petitioner] could show that he had fulfilled the central purpose of his sabbatical and performance plans [*i.e.*, writing a book], he cannot show that Secretary Adams' reason for denying his promotion was pretextual." Pet. App. 12a. Here the court disregards the fact that petitioner's supervisor believed that he *had* fulfilled the primary element in his performance plan. But the more essential point is that the court's draconian formulation admits of no exception, not even the government's hypothetical about weighty curatorial responsibilities.

Given the appellate court's ruling, petitioner said that the court had viewed the Smithsonian's explanation for the promotion denial "as unassailable by any means other than direct demonstration of its falsity." Pet. 8. The government of course takes exception, Br. Opp. 9, knowing that such an approach to pretext would be indefensible. *See Patterson*, 491 U.S. at 187. Nevertheless, this is exactly what the court did.

## II.

As additional evidence of pretext—beyond the statistics correlating promotion with youth and the age-laden comments, both of which also supported petitioner's prima facie case, *and* his supervisor's assessment that petitioner's work in 1990 "constituted successful performance" of his book-writing assignment, *and* proof that he could not finish the book "because of factors beyond his control"—petitioner also offered comparative evidence. He showed that other, younger curators were not required to complete a book as a

condition of promotion. But the Court of Appeals refused to consider this as well, and the refusal was expressly grounded on the noncompetitive nature of the promotion at issue: "Dr. Forman's task is more difficult to the extent he is competing against himself. That the promotion of others did not depend on completion of a book is *irrelevant* to Dr. Forman's particular promotion decision." Pet. App. 13a (emphasis added).

Petitioner said that the question presented by this petition is "[w]hether a discrimination case involving noncompetitive promotion should be subject to more restrictive standards of proof than one involving competitive promotion." To be sure, the Court of Appeals did not baldly state that it was subjecting noncompetitive promotions to more stringent standards of proof than would apply to competitive advancement, but that is precisely what it did. And so the court called petitioner's comparative evidence "irrelevant," even though such proof has been a staple of discrimination litigation since this Court first said nearly 30 years ago that it was "[e]specially relevant" to the assessment of pretext. *McDonnell Douglas*, 411 U.S. at 804.

In fact, comparative analysis is frequently essential in determining whether particular personnel actions were animated by prohibited bias, regardless of whether the actions were competitive *or* noncompetitive. *See University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 193 (1990) (peer review materials relating to professors granted tenure were relevant in a suit alleging discriminatory tenure denial); *McDonnell Douglas*, 411 U.S. at 804 ("[e]specially relevant to such a showing [of pretext] would be evidence that white employees involved in acts against petitioner of comparable seriousness to the 'stall-in' were nevertheless retained or rehired").

The government understands very well that the Court of Appeals erred in barring comparative evidence, and so simply

denies that it did so. In the courts below, though, the government emphatically argued that "noncompetitive implies noncomparative." *See, e.g.*, the parties' Joint Appendix (JA) in the Court of Appeals at 523 ("[w]hen Dr. Forman was considered for promotion, he was competing against himself. * * * Consequently, the relative qualifications [of others] are not relevant"), 507 (same). Both the district court, JA 58, and the Court of Appeals, Pet. App. 13, adopted this erroneous view. This was not adventitious but instead was the inevitable product of the argument urged by the government, any pretense to the contrary notwithstanding.

## III.

In 1991 Robert Hoffman, the Assistant Secretary in charge of research at the Smithsonian, lobbied for petitioner's promotion, citing laudatory reviews by distinguished scholars from such institutions as California Institute of Technology, Duke University, Johns Hopkins University, University of California at Berkeley, University of California at Irvine. Pet. App. 65a-76a. Hoffmann concluded that "someone who is clearly considered by the best of his peers as one of the best historians of modern science, both in his scholarly writings and in the exhibitions he has curated, is deserving of a grade 14." *Id.* at 78a.

It would never be proper for a court to employ an erroneous legal standard to dismiss a complaint. But especially in circumstances such as these, where an exceptionally well qualified EEO plaintiff lost on summary judgment, it was vital for the Court of Appeals to follow this Court's instructions on pretext in determining whether a rational trier of fact could have found for petitioner, after "draw[ing] all reasonable inferences in [his] favor." *Reeves*, 530 U.S. at 150.

As has been shown, however, the Court of Appeals departed radically from the pretext regime established by this

Court in *McDonnell Douglas*, *Patterson* and *Reeves*. In particular, the court, in assessing pretext, (1) did not permit petitioner to rely on comparative evidence, in contravention of *McDonnell Douglas*, 411 U.S. at 804, (2) narrowly circumscribed petitioner's proof of pretext by ruling that he could discredit the Smithsonian's explanation *only* by showing that he had written a book, thereby flouting *Patterson*, 491 U.S. at 187, and (3) disregarded the evidence marshaled by petitioner in support of his prima facie case, contrary to this Court's teaching in both *Reeves*, 530 U.S. at 143, and *Burdine*, 450 U.S. at 255 n.10.

In addition, the Court of Appeals erroneously conflated the truth of one assertion—that petitioner had not written a book—with the truth of the government's very different assertion that the lack of a book motivated the promotion denial. In *Hunt v. Cromartie*, 526 U.S. 541, 548 (1999), this Court noted that the issue of unlawful motivation may not be susceptible of resolution on summary judgment even if the underlying facts are undisputed, because "motivation is itself a factual question." *Hunt*'s message is especially pertinent here, where there is abundant evidence of pretext under *McDonnell Douglas*, *Patterson* and *Reeves*.

In *Reeves*, this Court simply reaffirmed the unmistakable lesson of *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), specifically that "[t]he factfinder's disbelief of the reasons put forward by the defendant . . . may, together with the elements of the prima facie case, suffice to show intentional discrimination." *See Reeves*, 530 U.S. at 147. This is a straightforward point, but some courts even after *Hicks* were requiring direct evidence of bias, so *Reeves* was needed to emphasize that the Court meant what it said.

Similar reiteration is necessary here, where the Court of Appeals has strayed far from this Court's path on pretext. In these circumstances, the Court may wish to consider the propriety of summary reversal.

## CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

DOUGLAS B. HURON *
STEPHEN Z. CHERTKOF
HELLER, HURON, CHERTKOF
LERNER, SIMON & SALZMAN
1730 M Street, N.W.
Suite 412
Washington, DC 20036
(202) 293-8090

* Counsel of Record

*Attorneys for Petitioner*